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No. 692

In the

Supreme Court of the United States

OCTOBER TERM, 1966

THE MORRISON MILLING COMPANY,

Petitioner,

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

The Morrison Milling Company, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on July 18, 1966.

Opinions Below

The opinion of the court of appeals (Appendix B, *infra*, pp. B1-10) is not yet officially reported. The memorandum opinion of the district court is printed at R. 93-99.[1]

[1] "R. ..." refers to the Joint Appendix in the court of appeals, nine additional copies of which have been filed with this Court under Rule 21(3) and (4).

Jurisdiction

The judgment of the court of appeals was entered on July 18, 1966 (App. B, p. B-11). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Persons engaged in the processing of wheat into human food products are required, prior to marketing or removing such food product for sale or consumption, to purchase from the Government so-called domestic marketing certificates "equivalent to the number of bushels of *wheat contained in such product.*" 7 U.S.C.A. §1379d(b), §1379f.

Regulations issued by the Secretary of Agriculture ("Secretary"), however, compel wheat processors to acquire such marketing certificates "equivalent to the number of bushels of *wheat used in processing the food products*", 7 C.F.R. §777.11(a), and thus impose marketing certificate liability not only upon the "wheat contained in" the finished food products to be sold and consumed, but also upon (i) foreign substances and unsuitable wheat kernels separated from the usable wheat before processing, (ii) moisture which evaporates from the wheat during storage and processing, (iii) wheat lost in handling, storage and processing, and (iv) some 27-28% of the wheat subjected to processing which is separated purposely by processing and disposed of as waste or for animal feed or other non-food use.

The question presented is whether such regulations are invalid because they are inconsistent with the controlling statute and because they are arbitrary, discriminatory and without rational basis.

Statutes and Regulations Involved

The statutes[2] and regulations[3] involved in this case are lengthy and are, therefore, set forth in Appendix A, *infra*, pp. A1-33.[4]

The particular statutory provisions which are most critical, however, are, first, 7 U.S.C.A. §1379d(b) which provides that as to the 1964 and the 1965 wheat crop marketing years[5]:

> "During any marketing year for which a wheat marketing allocation program is in effect, (i) all persons engaged in the processing of wheat into food products shall, *prior to marketing any such food product* or removing such food product for sale or consumption, acquire domestic marketing certificates *equivalent to the number of bushels of wheat contained in such product*

[2] The *Agricultural Act of 1938*, 50 Stat. 31, 7 U.S.C.A. §1281, as amended by the *Food and Agricultural Act of 1962*, 76 Stat. 605, 7 U.S.C.A. §§1331-40 and §§1379a-j (1964 ed.) and as further amended by the *Agricultural Act of 1964*, 78 Stat. 173, 7 U.S.C.A. §§1379b-d (Supp. 1965).

[3] Processor Wheat Marketing Certificate Regulations, 7 C.F.R. §§777.2-.17 (1966 ed.).

[4] The statutory provisions applicable to the two years which are *directly* in issue, 1964 and 1965, are not presently reported as such in the 1965 Pocket Part to 7 U.S.C.A. §§1331-40, 1379a-j — in view of subsequent amendments to these statutes which extended the "marketing certificate program", with certain modifications, for the wheat crop marketing years of 1966 through 1969. Accordingly, the provisions which were applicable to the 1964 and 1965 crop years are set forth in Appendix A, *infra*, pp. A1-18, and are hereinafter cited simply "7 U.S.C.A. §.....".

Similarly, the 1966 edition of 7 C.F.R. §§777.2-.17 contains the regulations applicable to the 1965 crop year. Appendix A, *infra*, pp. A 19-33, sets forth the regulations which were applicable to the 1964 crop year. Insofar as is here material, the regulations were substantially the same for both years.

[5] A wheat crop marketing year is, by statute, the period from July 1 of the designated year through June 30 of the ensuing year. 7 U.S.C.A. §1301(5), (7) (1964 ed.).

> and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. * * *" (Emphasis added),

and, secondly, 7 U.S.C.A. §1379f which provides that as to this marketing certificate liability of wheat processors based upon "wheat contained in" such food products which have been processed and which are ready to be sold and consumed:

> "The Secretary shall establish conversion factors which shall be used to determine the amount of *wheat contained in any food product.* The conversion factor for any such food product shall be determined upon the basis of the weight of *wheat used in the manufacture of such product.*" (Emphasis added.)

The particular administrative regulation which is most critical is 7 C.F.R. §777.11(a), which provides that:

> "Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in § 777.10. The number of certificates acquired by the food processor and surrendered to CCC shall be *equivalent to the number of bushels of wheat used in processing the food products* for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§ 777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation." (Emphasis added.)

Statement

This controversy involves the liability of wheat processors for so-called "marketing certificates" under the provisions of the wheat subsidy and support program operative for the wheat crop marketing years of 1964 and 1965.[6]

1.

Prior to the commencement of this program (on July 1, 1964), wheat growers who complied with their acreage allotments received price support at an average level of $2.00 per bushel in the form of (i) price support "loans"[7] averaging $1.82 from the Commodity Credit Corporation ("CCC") on all the wheat they produced and (ii) additional payments of 18¢ per bushel from the CCC (R. 74).

The wheat subsidy and support program for 1964 and 1965 introduced a much more complicated scheme—but still one designed to assure wheat growers an average price support level of $2.00 per bushel. Under it, a grower who complied with his acreage allotments *and* who devoted the diverted acreage to approved conservation uses was entitled to receive in the 1964 wheat year:

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[6] And subsequently extended with certain modifications, *but with precisely the same operative statutory language here in issue*, for the wheat crop years of 1966 through 1969, by the Food and Agriculture Act of 1965, 79 Stat. 1202, 7 U.S.C.A. §§1379b, §1379d(b) (Supp. 1965).

[7] A wheat grower would secure a non-recourse "loan" from the CCC at the "loan rate" using the wheat as security. Then, if the actual market price for wheat exceeded this "loan rate" (or price support), the grower sold his wheat at that price, repaid the CCC loan and kept the difference. If, however, the market price was lower than the "loan rate", the grower simply "defaulted" on his loan and "forfeited" his wheat to the CCC. 7 C.F.R. §§1421.50-.78 (1966 ed.).

(i) CCC price support loans at the reduced average rate of $1.30[8] per bushel on all wheat actually harvested;

(ii) wheat acreage diversion payments of 20% of the CCC "loan rate" for acreage diverted to approved conservation uses, up to a maximum of 15 acres (R. 47). 7 U.S.C.A. § 1339(b); 7 C.F.R. §§ 728.50-.76 (1966 ed.);

(iii) 70¢ domestic marketing certificates on 45% of the estimated yield of his allotted acreage;[9]

(iv) 25¢ export marketing certificates on another 45% of the estimated yield of his allotted acreage;[9]

(v) no marketing certificates whatever—and only the average loan rate of $1.30 per bushel—for the remaining 10% of his estimated yield and for that portion of the wheat actually harvested which exceeded 90% of the estimated yield, 7 U.S.C.A. § 1379c(a).

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[8] These "loan rates" actually varied from 96¢ to $1.63 per bushel, depending upon the grade of wheat, locality and other factors, while the "national average loan rate" was $1.30 per bushel (R. 38-39); 26 C.F.R. §1421.2133 (1966 ed.).

[9] The Secretary—in order to reduce surpluses and avoid overproduction and depressed wheat prices—was in essence required to limit allotments to that acreage which would, based on anticipated yield, produce an estimated amount of wheat to be (i) utilized as human food in the United States, (ii) utilized as seed in the United States, (iii) exported and (iv) used as animal feed. 7 U.S.C.A. §1332-34; 7 C.F.R. §§728.202-203 (1966 ed.).

A wheat grower was entitled to 70¢ domestic marketing certificates on that portion of the estimated yield from his individual acreage allotment which (when scaled down from the national estimate) would represent the estimated wheat to be utilized as human food in the United States; this portion was 45% of such estimated yield in 1964. And, as to that portion of his anticipated yield from his acreage allotment which (when scaled down on a national basis) would represent the estimated wheat to be exported, the grower was entitled to 25¢ export marketing certificates *only* upon that part which the Secretary determined should bear export certificates in order to achieve congressional objectives as to wheat prices and income of wheat growers. 7 U.S.C.A. §§1379b, 1379c(a); this was also set at 45% of the estimated yield in 1964.

On the remaining portion of the estimated yield from his acreage allotment (which, on a theoretical national basis, would represent estimates of wheat to be used for animal feed and for seed and a portion of the wheat to be exported), and on that portion of his *actual harvest* which exceeded the estimated yield, the grower was entitled to no market certificates at all. 7 U.S.C.A. §1379c(a).

The same was true with respect to the 1965 wheat crop year, with the exception that domestic marketing certificates[10] were priced at 75¢ and export certificates at 30¢. 7 C.F.R. §777.103 (1966 ed.).

A *portion* of the costs of this program of subsidizing and supporting wheat growers was taxed against processors of wheat. 7 U.S.C.A. § 1379d(b) exacts revenue from persons engaged in processing wheat into human food products by requiring such processors, prior to marketing any such food product for sale or consumption, to "acquire domestic marketing certificates equivalent to the number of bushels of *wheat contained in such product.*" Confirming this, 7 U.S.C.A. § 1379f specifically provides, in mandatory terms, that the Secretary "shall establish" conversion factors . . . that such conversion factors "shall be used" to determine "the amount of wheat contained in any food product" (i.e., the processor's certificate liability under §1379d(b)) . . . and that such factors "shall be determined" upon the basis of the weight of wheat used in the manufacture of such food product.

Ignoring this plain language of § 1379d(b) and § 1379f, the Secretary issued regulations compelling processors to acquire domestic marketing certificates "equivalent to the number of bushels of *wheat used in processing the food products.*" 7 C.F.R. §777.11(a). The admitted and

[10] In fact, the physical issuance of "certificates" proved to be fictional; the growers simply received checks from the CCC in the required amounts for the "marketing certificate payments" (R. 27, 94 at fn. 1).

intended result of this deviation from the statutory language was to subject processors to the marketing certificate liability not just for the wheat actually "contained in" the completely processed food products ready for sale and consumption, but also for the four items here in issue, to-wit:

(i) *cleanings and screenings:* foreign substances (e.g., rocks, sticks, metal scraps, etc.) and unsuitable wheat (e.g., damaged and shriveled kernels) mingled with the raw matter acquired, but separated from the usable wheat before processing (R. 18-23, 41-42);

(ii) *shrinkage:* moisture contained in the wheat when acquired, but lost by evaporation both during storage and in processing (R. 18-25);

(iii) *wastage:* wheat that is spilled or that clings to bins or is otherwise lost in storage, in handling or in processing (R. 22-24); and

(iv) *millfeeds:* the some 27-28%[11] of the usable wheat kernels subjected to processing which is separated purposely in the course of processing operations,[12] disposed

[11] The reference in the opinion below (App. B, p. B-4) to the figure of "18 percent" is, apparently, a typographical error; the correct and undisputed percentage is some 27-28% (R. 23-25, 39). See 7 C.F.R. §777.14(c).

[12] In the processing of wheat into flour, the bran (outer kernel of the wheat), the wheat "middlings" or "shorts" (coarser portions of the white endosperm within the kernel) and the germ (sprouting section of the kernel) are first separated from the fine portion of the endosperm of which the flour is to be made (R. 23-24). The bran, middlings and shorts thus separated from the "flour stream" are called "millfeeds"; except for a very limited market for particular types of bran for breakfast foods and of wheat germ for specialty foods, they are not marketable as food products and are thus disposed of for animal foodstuffs or other non-food uses (R. 23-24). 7 C.F.R. §777.3(c). The isolated endosperm is then milled into flour by further processing—during which such things as bleaching and maturing agents, vitamins, bromates, phosphates, salt, water, etc., may be added for various reasons (R. 24). Thus, by virtue of the separation of the millfeeds, *the food product (flour) which results from the processing operations contains only (except for these additives) approximately 72-73% of the usable wheat originally subjected to processing (R. 39, 23-24).*

of as waste or for animal feed or other non-food use, and thus is not part of or "contained in" the finished food products resulting from the processing (R. 23-25, 39).

These regulations thus substantially increase the liability of wheat processors for marketing certificates beyond the plain language of §1379d(b) and §1379f. For instance, *the Secretary contended in the trial court that this suit seeks to recover, on behalf of the some 500 companies in the wheat processing industry in this country, some $94.5 million for the year 1964 alone (R. 39). A similar or perhaps even greater sum would be involved for the year 1965* (when the face amount of domestic marketing certificates was increased from 70¢ to 75¢ per bushel).

2.

Under this 1964-65 subsidy and support program, the face amount charged the processors for each domestic marketing certificate they were required to "purchase"[13] from the CCC is the same as the face amount of the marketing certificate payments made to growers (i.e., 70¢ per bushel in 1964, 75¢ per bushel in 1965). 7 C.F.R. §§ 728.103, 777.4(a) (1966 ed.).

However, from the framework of the program, it is manifestly evident that—contrary to the misconceptions urged by the Secretary and accepted by both lower courts—*this sameness of the face amount of the certificates "sold" to processors and "issued" to growers did not mean that wheat processors were to be required to purchase a 70¢ certificate for each 70¢ certificate issued to growers.* In particular:

[13] Just as in the case of certificate payments to growers, no marketing certificates were "issued" to wheat processors. Instead, the CCC simply required processors to make monthly "food processing reports" and to make monthly payments of their marketing certificate liability in conjunction with such reports (R. 27, 94 at fn. 1). 7 C.F.R. §§777.11-.14.

(i) 70¢ certificate payments were not made for each bushel of wheat which the growers harvested and sold to processors. Instead, such certificate payments to growers were based—not upon actual harvest and sales—but upon an advance estimate (scaled down on a national basis) of the anticipated yield from his acreage allotment, an estimate made long prior to harvest.[14] Furthermore, growers received 70¢ domestic certificate payments only upon less than one-half of this estimated yield (and 25¢ export certificates on an equal portion and only the $1.30 average loan rate on the balance) (R. 47).

(ii) Contrariwise, the processor's certificate liability is based upon actuality, not estimates, to-wit: the amount of wheat in fact "contained in" the finished food products which the processor is "marketing * * * or removing for sale or consumption." 7 U.S.C.A. §§ 1379d(b), 1379f.

(iii) Moreover, the *processor must pay the certificate levy even though the wheat "contained in" his finished food products was not even subject to the marketing certificate program and even though no grower received certificate payments for such wheat*[15] . . . either because it was purchased from a grower who refused to comply with his acreage allotment . . . or from a grower who refused to devote his diverted acreage to approved conservation uses . . . or from

[15] Since marketing certificates are thus based upon an advance estimated yield, and not upon actual harvest, the grower receives precisely the same amount of certificate payments (i) whether his actual yield is high, is low or is even nonexistent and (ii) whether actual purchases of wheat by processors are heavy or light. 7 U.S.C.A. §§1379b, c.

the CCC or private owners out of pre-164 wheat . . . or from an importer outside of the United States (R. 46-47). 7 U.S.C.A. §§ 1379c, d.

(iv) Because of the foregoing, it is obvious that *under the invalid regulations here in issue there will be an extraordinary net profit realized each year from the domestic marketing certificate program.* To illustrate, in 1964 a grower would receive 25¢ export marketing certificates on 45% of his estimated yield (scaled down on a national basis), 70¢ domestic marketing certificates on another 45% of his estimated yield, and no marketing certificates at all on the remaining 10% of his estimated yield and on that portion of his actual harvest which exceeded 90% of his estimated yield. Yet, a processor who acquires all of the wheat harvested by this grower is forced by the Secretary's regulations to pay 70¢ for domestic marketing certificates on each and every bushel. Thus, a very sizable net profit will result if the domestic marketing certificate levy is imposed upon the bushels of raw material purchased by the processors and not —in accordance with the clear and unambiguous language of §1379d(b)—only upon the wheat actually "contained in" the finished food products. Indeed, the figures submitted by the CCC in 1965 in support of a request for a general supplemental appropriation showed that *for the 1964 crop*

[18] *In the 1964 crop year, one-fourth of the wheat acreage actually planted was planted by farmers who were not eligible for marketing certificate payments* either because they did not comply with their acreage allotments or because they did not devote their devoted acreage to approved conservation uses. U.S.D.A. Press Release No. 1755-64, May 27, 1964, appearing as Exhibit C to Affidavit of Cyril V. Smith, Jr., filed on March 8, 1965 (R. 1) and contained in the original record and exhibits transmitted to this Court, but not printed in the Joint Appendix below.

year the CCC realized from the marketing certificate program a net profit of $75.2 million. Hearings on H. J. Res. 234 Before the Senate Committee on Appropriations, 89th Cong., 1st Sess., p. 29 (Jan. 25, 1965).

(v) Finally, the amount of certificate payments made to growers is not limited to (or in any manner conditioned upon) the amount of revenue obtained by the CCC from the marketing certificate liability levied upon the wheat processors. To the contrary, the CCC may use the revenue thus obtained from the processors for any purpose and is not limited to using it only to make certificate payments to the growers. 15 U.S.C.A. §§ 713a-10, a-11, b, f (1963 ed.).

3.

The present action was filed by six wheat processors (including Petitioner The Morrison Milling Company). (R. 5) —individually and as a class action on behalf of the some 500 companies in the wheat processing industry in the United States (R. 6)—seeking a declaration that the regulations were invalid (i) because they were inconsistent with the controlling statutory provisions, including § 1379d(b) and § 1379f; and, alternatively (ii) because they were arbitrary, discriminatory and without rational basis (R. 7-11).

Jurisdiction of the federal district court was invoked because the cause of action arises under a law relating to commerce, i.e., the Agricultural Adjustment Act of 1938, as amended in 1962 and 1964, and involves an amount in controversy in excess of $10,000, 28 U.S.C. §§ 1331, 1337 . . . is against the CCC, 15 U.S.C. § 714b . . . and is an appeal

from final agency action for which there is no other adequate remedy[16], 5 U.S.C. § 1009(c). Some 39 additional processors subsequently requested, and were granted, leave to intervene (R. 81-92).

The case came before the trial court on cross motions for summary judgment (R. 14, 36). The trial court upheld the validity of the regulations (R. 93-99), and the court of appeals affirmed (App. B, pp. B1-11).



[16] Because of the stringent criminal and civil penalties imposed upon violators of the wheat marketing certificate requirements, 7 U.S.C.A. §1379i, the Petitioner and other processors had no choice but to pay the certificate levy in the amount required by the Secretary's regulations under protest and with the saving of rights (R. 10-11). 7 C.F.R. §777.17. They duly proceeded, by the administrative procedures available, to object to such regulations and to make individual demands for refunds of the amounts paid under protest (R. 11). The Secretary refused to change the regulations so that they would be consistent with the controlling statutes and rejected the claims for refunds (R. 11, 29-32).

Reasons for Granting the Writ

This case presents a question of statutory construction which is of critical importance to the entire wheat processing industry in the United States: the liability of the some 500 wheat processors for "domestic marketing certificates" under the wheat subsidy and support program for the 1964 and 1965 crop years.

Involved are extraordinarily large amounts of money—estimated by the Government itself to total some $95 million dollars for each year in controversy (R. 39.) This question is, moreover, of continuing vital concern to wheat processors—and the sums of money in dispute will continue to pyramid—under the subsequent wheat subsidy program[17] which extended the marketing certificate liability of processors, in precisely the same operative statutory language here at issue, for the wheat crop years of 1966 through 1969. And, the resolution of this question will have immediate public importance far beyond the parties to this litigation and even beyond the some 500 wheat processors directly affected.

This being a question of first impression, there is no square conflict of decisions. However, without action by this Court, the opinion below will erode and subvert standard principles of statutory construction because (1) it distorts the ordinary, usual meaning of the plain language of the statutes involved, § 1379d(b) and § 1379f . . . (2) despite the fact that such plain, ordinary meaning of the words used does not result in absurd consequences or thwart the purposes of the statutes . . . and even though such action is not justified either

[17] The Food and Agriculture Act of 1965, 79 Stat. 1202, 7 U.S.C.A. §§1331-40 and §§1379a-j (1964 ed. and Supp. 1965).

by (3) the inconclusive and unpersuasive legislative material relied upon or (4) the supposed administrative construction of these statutes by the Secretary. Alternatively, (5) the regulations are invalid because they are arbitrary, discriminatory and without rational basis.

Under these circumstances, review by this Court is required.

1.

As this Court has "often said, 'the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses'. Crane v. Commissioner, 331 U.S. 1, 6." *Malat v. Riddell*, 383 U.S. 569 (1966).

The "ordinary, everyday" meaning of the language of § 1379d(b) is evident. In specific, clear and nontechnical terms, it requires processors of wheat food products, "prior to marketing any such food product * * * for sale or consumption" to acquire domestic marketing certificates "equivalent to the number of bushels of wheat contained in such product." Under the obvious frame of reference by the critical phrase "prior to marketing any such food product * * * for sale or consumption," the processor is subjected to certificate liability *only* upon that wheat which is in fact "contained in" the finished food product ready to be sold and consumed—and not upon the total amount of raw material which he acquires for processing into such food products.

That the use of such language was deliberate, not inadvertent, is confirmed by its repetition in § 1379f and its juxtaposition there with the very terminology into which the Secretary would distort it. § 1379f provides:

> "The Secretary shall establish conversion factors which shall be used to determine the amount of *wheat contained in any food product*. The conversion factor for any such food product shall be determined upon the basis of the weight of *wheat used in the manufacture of such product*." (Emphasis added.)

Again, the "ordinary, everyday" meaning of this language is evident. A conversion factor is used to determine an unknown from a known. § 1379f, in the first sentence, specifies that the conversion factor shall "be used to determine the amount of wheat contained in any food product." That, then, is the unknown. The second sentence states that the factor for any food product shall be based on the "weight of wheat used in the manufacture of such product." That is the known, to which the factor is to be applied in order to determine the unknown—i.e., the "amount of wheat contained in" the food product. Language could not be clearer.

Nevertheless, the Secretary has ignored these specific and manadatory directions. He has not established conversion factors as required by § 1379f. Wheat processors are not provided with or permitted to use any conversion factor in order to determine, from the weight of wheat used in the processing of their food product, what wheat is in fact "con-

tained in" such product.[18] Indeed to the contrary, *the only conversion factors that the Secretary has established are factors to be applied to the finished food product in order to determine the weight of wheat used in its manufacture or processing.* 7 C.F.R. §§ 777.13-.14, Appendices II and III.

This is flatly contradictory to the plain language of § 1379f. And, this topsy-turvy interpretation simply cannot be justified by the court of appeals' summary comment that in light of "evidence * * * that this statute was enacted against the background of conversion factors devised in accordance with the Secretary's approach * * * the phrasing of § 1379f may be reasonably read as the Government contends." (App. B, p. B-6, fn. 1).

The only such "evidence" in the record is a representation made in the affidavit of Arnold A. Garthoff that there were "traditional" conversion factors used by the Department of Agriculture (R. 69). So there were—but, as the Garthoff affi-

[18] Removal of foreign matter and unsuitable wheat, wastage and evaporation of moisture reduces the weight of the raw material acquired for processing. In addition, some 27-28% of the cleaned and usable wheat subjected to processing is removed as wastes and non-food by-products (millfeeds) and is not "contained in" the final processed food product. On the other hand, quantities of non-wheat additives—e.g., bleaching, maturing and enriching agents, vitamins, iron, bromates, phosphates, soda, salt, etc.—are added in the processing operations, and the amounts of such additives vary from product to product (R. 24, 69). Thus, it was logical and appropriate for Congress to provide for the use of conversion factors, to be applied to the weight of wheat used in manufacture (a figure which can be conveniently ascertained, R. 15-16), and to determine—by making due allowance for nonwheat additives, millfeeds, shrinkage, wastage and cleanings and screenings—what wheat is "contained in" the final processed food product.

davit[19] itself shows (R. 67), these were in connection with the Department's flour export subsidy program. And, in fact, the conversion factor (not cited in the affidavit) for wheat flour in the Department's regulations dealing with this program is stated as "1.000". 7 C.F.R. § 1483.222 (1966 ed.). That, of course, is quite different from the conversion factor for flour given in the Secretary's regulations here in dispute, to-wit: "2.283". 7 C.F.R. § 777.14(c). As is evident, there are many conversion factors employed for many purposes. There is, in short, no "accepted" conversion factor table to which § 1379f was referring; and there is certainly no evidence which would support a summary judgment that it was referring to the conversion factors that the Secretary had used in the flour export program.

In the last analysis, the courts below approved the action of the Secretary in completely reversing § 1379f so that this section reads:

> "The Secretary shall establish conversion factors which shall be used to determine the *amount of wheat used in the manufacture of any food product.* The conversion factor for any such food product shall be determined upon the basis of the *weight of all contents of the food product.*"

This Court has rejected similar attempts of statutory emasculation, holding that where a "statute admits a reasonable

[19] The representation in the Garthoff affidavit (R. 68-69) that the wheat processors "did not question" and were in "general accord" with the position of the Department of Agriculture regarding conversion factors under §1379f is far removed from the truth. The processors disagreed with the positions taken and the regulations issued by the Department, from the beginning to the present date. This is detailed in the affidavits of Carl R. Pilz (R. 15-17) and Frederick P. Furth (R. 29-35) and in the Complaint (R. 10-11).

construction which gives effect to all of its provisions * * * we will not adopt a strained reading which renders one part a mere redundancy." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961).

2.

Unquestionably the courts, in interpreting a statute, "have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results * * * or would thwart the obvious purpose of the statute.' Helvering v. Hammel, 311 U.S. 504 * * * But it is otherwise 'where no such consequences would follow and where * * * it appears to be consonant with the purposes of the Act * * *'." *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

The two courts below concluded, as the Secretary maintains, that the interpretation of the plain language of § 1379d(b) and § 1379f in its ordinary, usual sense would defeat the purpose of the 1964-65 wheat subsidy and support program to maintain the average "income level" of wheat growers at $2.00 per bushel (the pre-1964 level) by compelling processors to finance the 70¢ difference between the reduced CCC average loan rate of $1.30 per bushel and the $2.00 per bushel desired (R. 39, 73-75, 97; App. B, pp. B2-3, 6).

This is, without doubt, totally fallacious. First, the fact is obvious that the intended average income of $2.00 per bushel under the subsidy program was not based *solely* upon

the $1.30 loan rate plus the 70¢ domestic marketing levy imposed upon the processors. *Wheat growers received such 70¢ certificates on less than one-half of their estimated harvest* (in 1964, 45%). Thus, in order to determine the "income level" of wheat growers, it is necessary to consider and average all of the four types of price supports and payments afforded the growers under this complex program—CCC average loan rate of $1.30 per bushel on all wheat actually harvested, wheat acreage diversion payments of 20% of such loan rate for acreage diverted up to 15 acres, 70¢ domestic marketing certificates on 45% of the estimated yield from the acreage allotment, and 25¢ export certificates on another 45% of such estimated yield.

Secondly, *the income realized by wheat growers under this program would not be reduced one whit if the processors' liability for marketing certificates is, as it should be under the plain language of § 1379d(b) and § 1379f, limited to the "wheat contained in" the finished food products.* None of the four types of support afforded to growers will be adversely affected in any manner by the outcome of this appeal. In particular, the 70¢ domestic certificate payments made to growers are based—not upon actual harvests and sales of wheat—but upon an advance estimate of the anticipated yield from their acreage allotments, an estimate made long prior to harvest. Thus, the amount of the 70¢ certificate payments made to growers under the program will remain

precisely the same, regardless of whether the number of certificates which the processors are required to purchase increases or decreases.[20]

And, as to the purpose of the program in imposing a *portion* of the wheat subsidy costs upon the processors, that is precisely what is at issue in the present case. Any "bootstrap" argument that the purpose of the Act was to impose liability upon the processors for all of the raw material acquired for processing—and that, therefore, this purpose would be defeated unless the Secretary's invalid regulations are approved—is obviously unsupportable. As this Court has repeatedly noted, "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940); *Richards v. United States*, 369 U.S. 1, 9 (1962).

3.

Nor is there any "legislative history" which would justify the emasculation of the ordinary, usual meaning of the clear and specific language of § 1379d(b) and § 1379f.

[20] Furthermore, the claim of the Secretary that the rejection of the ordinary, usual meaning of §1379d(b) and §1379f is required to prevent the Government from being placed in a deficit position with respect to domestic certificate payments to growers (R. 39) simply does not jibe with the facts that (i) the CCC is no longer required to make the 18¢ per bushel payments which it did prior to the 1964-65 program, and (ii) the CCC's request for a general supplemental appropriation in 1965 estimated that for the 1964 crop year the CCC realized from the domestic certificate program a net profit of $75.2 million. Hearings on H. J. Res. 234 Before the Senate Committee on Appropriations, 89th Cong., 1st Sess., p. 29 (Jan. 25, 1965).

The legislative material is devoid of any recorded instance in which Congress addressed itself to the question of whether the domestic marketing certificate levy was to be based upon the total weight of the raw, unprocessed material—or, as the chosen statutory words plainly indicate, only upon the "wheat contained in" the finished food products ready for sale and consumption.[21] This being so, it must be assumed that the legislative intent is expressed by the ordinary meaning of the words used. *Richards v. United States*, 369 U.S. 1, 9 (1962).

In particular, the items of supposed "legislative history" relied upon by the lower courts (and urged by the Secretary) are inconclusive and unpersuasive because they are directed to other matters, not to the single question here in controversy. To illustrate:

(i) The opinion below places primary reliance[22] upon isolated exchanges or statements occurring during congressional debates, or out-of-context sentences from committee reports, to the effect that the 1964-65 subsidy program would not increase the price of wheat from its then price of $2.00 per bushel—because the reduced CCC average sup-

[21] Most nearly in point on this specific issue are the virtually identical House and Senate exchanges reported in 108 Cong. Rec. 11377-78 (June 21, 1962) and 108 Cong. Rec. 17228 (Aug. 21, 1962). They support the position of the wheat processors, not that of the Secretary.

[22] The opinion below also refers to the Senate Committee Report on the 1964 amendments to the program (App. B, pp. B6-7). Reference to this report, 1964 U.S. Code Cong. & Adm. News 2142 at 2154, will show that the court of appeals' quotation is out of context from two minor and technical amendments (numbered "15" and "16" in the report) which have nothing to do with the point at issue in this appeal.

port level would be $1.30 and the processor would be paying the 70¢ marketing certificate levy on each bushel of wheat that he "purchased" or "processed" (App. B, pp. B6-7).

(ii) But these exchanges and statements *were not* addressed to the question of whether § 1379d(b) and § 1379f, despite their plain language to the contrary, imposed the marketing certificate liability upon the raw wheat "used in processing". To the contrary, they merely reflected the overriding concern in Congress as to whether the new marketing certificate program would cause an increase in the price of bread.

(iii) Opponents of the program insisted that it would. Supporters instited that it would not. Thus scattered through much of the congressional debates and reports are various figures, and much confusion, about wheat costs. But all that the speakers were saying was that the processors' costs would not be increased over the then current $2.00 per bushel wheat cost. And, the simple addition of $1.30 CCC loan rate and the 70¢ domestic certificate face amount was all that had to be done in order to make the point that under the new program a processor's cost of wheat in no event could be *more* than the then current $2.00.

(iv) All kinds of figures were bandied about. Finally Congressman Purcell confessed that all the figures they were using were speculative. He said:

> "That is purely speculation and I do not think anyone can honestly say, with all the figures available, what the price of wheat will be." 110 Cong. Rec. 7175 (April 7, 1964).

The point is that the references in the legislative material to figures and to the costs of wheat were rough, illustrative figures[23] which no one thought of as reflecting what the exact scope of the processors' certificate liability would be—and that no one was purporting to deal with the specific question of whether the levy would apply only to "wheat contained in" the finished food product as plainly stated in § 1379d (b) and § 1379f, or to all of the raw material acquired for processing.

Obviously, such legislative history is unavailing to dictate a meaning or congressional intent contrary to that revealed by the statute's plain language. *United States v. Oregon*, 366 U.S. 643, 648 (1961); *FTC v. Sun Oil Co.*, 371 U.S. 505, 517 (1963).

4.

The opinion below cannot be justified, as the court of appeals professed, on the basis of any "special respect" to the "Secretary's own reading of a statute which Congress has

[23] In fact, even taken at face value, these references to wheat costs support the position of the wheat processors, not that of the Secretary. An increase in the then assumed $2.00 per bushel cost of wheat was not intended. Yet, by 7 U.S.C. §1427 the CCC is prohibited from selling wheat for less than 105% of the current support price plus carrying charges. Thus, a $1.30 loan rate means that the CCC cannot sell the wheat for less than approximately $1.37 per bushel (i.e., 105% of $1.30, for a minimum of $1.365 plus carrying charges). Consequently, under the assumed $1.30 loan rate referred to in the congressional debates, the cost of wheat to processors would be some 7¢ per bushel more than the intended $2.00 per bushel if the processors are required not only to pay the CCC minimum of approximately $1.37 per bushel, but also to pay the 70¢ marketing certificate levy upon each bushel of raw material they purchase for processing and not just upon the bushels of wheat in fact "contained in" their finished food products. This is verified by the Department of Agriculture's own estimate that the 1964 season average price of wheat per bushel was $2.07 (i.e., $1.37 per bushel plus 70¢ certificate), not $2.00. See House Report No. 631, 89th Cong., 1st Sess., p. 46 (July 20, 1965).

given him the duty to administer" (App. B, p. B-8)—an interpretation which "was no sooner made than challenged." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944). No amount of judicial deference to administration construction can justify the Secretary's action in ignoring the ordinary, usual meaning of the plain language of § 1379d(b) and § 1379f which, as indicated above, does not lead to absurd results or thwart the purpose of the subsidy and support program. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-18 (1944); *Dixon v. United States*, 381 U.S. 68, 74 (1965).

Particularly is this true with respect to a taxation or revenue statute like that here involved. The "marketing certificate" label does not change or disguise the fact that the domestic certificate liability imposed upon the processors is, beyond question, an excise tax levied upon the processing of wheat—which compelled processors to pay a very substantial portion of the costs of the wheat subsidy program, thus effectively reducing the amount of money needed for this purpose from the general tax fund appropriations.[24] The subject of this tax was specified with certainty, in plain and unambiguous language ("*wheat contained in*" *processed food products ready for sale and consumption*). The Secretary has no discretion or authority to amend this language and to increase, by a total of some $94.5 million or more per year, the

[24] The attempted explanation of the court of appeals that this was not a taxation measure, but instead a statute "to regulate the price of wheat for the benefit of the grower" (App. B, pp. B7-8) is anomalous indeed. The domestic marketing certificates fictionally "sold" by the CCC to processors regulate nothing; they merely raise revenue.

wheat marketing certificate levy imposed upon the processors. *Dixon v. United States*, supra; *Gould v. Gould*, 245 U.S. 151, 153 (1917).

5.

Moreover, in the alternative, the regulations are invalid because they are arbitrary, discriminatory and without rational basis. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-18 (1944); *Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

That is, even assuming, *arguendo*, that the plain, specific language of § 1379d(b) and § 1379f can be twisted, as the regulations do, to require marketing certificates for "*wheat used in processing the food products*", the liability would be for just that: wheat (i.e., wheat kernels) used in processing. Processors thus would not be subject to the certificate levy upon the three of the four items here in controversy[25]—cleanings and screenings of foreign and unsuitable matter, moisture loss due to evaporation, and wheat lost through wastage in handling and storage—for these are simply not "wheat used in processing" within the ordinary, usual meaning of that language. *Malat v. Riddell*, 383 U.S. 569 (1966).

Yet, the regulations purposely impose the marketing certificate liability upon cleanings and screenings, shinkage and

[25] The fourth item in issue—*millfeeds*, the some 27-28% of the usable wheat subjected to processing which is purposely removed as wastes or non-food by-products in processing operations—does represent the principal portion of the processors' claims for refunds. However, the other three items (cleanings and screenings, shrinkage, wastage) do represent a substantial monetary claim in themselves and are in no sense de minimus.

wastage, 7 C.F.R. §§ 777.13-.14, Appendices II and III, and in so doing result in patently absurd consequences and discriminations, among which are the following:

(i) a processor who is able to purchase high-grade wheat (with more usable wheat and a lower content of foreign and unsuitable matter and moisture) very illogically pays a lesser tax than does his unfortunate competitor who is able to purchase only lower quality wheat (R. 18-23; Grain Standard Regulations for Wheat, 7 C.F.R. § 26.127);

(ii) a processor purchasing wheat from a middleman who has cleaning and drying facilities (R. 19-20) is not taxed upon all such foreign and unsuitable material and moisture loss, while his unfortunate competitor is.

These and the other absurd, arbitrary and discriminatory results occasioned by the regulations are eliminated if the plain, operative language of § 1379d(b) and § 1379f is given its ordinary, usual meaning.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Proof of Service

COUNTY OF DALLAS

STATE OF TEXAS

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared Jerry L. Buchmeyer, who being by me duly sworn upon oath stated:

I, Jerry L. Buchmeyer, am not a member of the bar of Supreme Court of the United States; but I am a duly licensed and practicing attorney and a member of the State Bar of Texas and have been one of the attorneys of record for petitioner herein in all proceedings had in the court of appeals below.

I further state upon oath that upon the 13th day of October, 1966, I served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, by mailing copies of such Petition, properly addressed, with air mail postage prepaid, upon:

(i) the counsel for Respondents Orville L. Freeman and Commodity Credit Corporation in the court of appeals below, to wit: J. William Doolittle (Acting Asst. Atty. Gen.), David G. Bress (U.S. Atty.) and Carl Eardley (Atty.), Appellate Section, Civil Division, Room 3706, U.S. Department of Justice, Washington 25, D.C.; and

(ii) the Solicitor General of the United States, U. S. Department of Justice, Washington 25, D. C.

Jerry L. Buchmeyer

JERRY L. BUCHMEYER

SWORN TO AND SUBSCRIBED before me by the said Jerry L. Buchmeyer this the 13th day of October, 1966.

Francene Hill

Notary Public in and for
Dallas County, Texas

Francene Hill

APPENDICES

Appendix A (Statutes and Regulations Involved)

1. Statutes—Wheat Support Program under the 1962 and 1964 Amendments to the Agricultural Adjustment Act of 1938, 7 U.S.C.A. §§ 1331-40 and §§ 1379a-j (1964 ed. and Supp. 1965) A-1

2. Regulations — Processor Wheat Marketing Certificate Regulations, 7 C.F.R. § 777.2-.17 (1965 ed.) A-19

Appendix B (Opinion and Judgment Below)

1. Opinion Below B-1

2. Judgment Below B-11

1. Statutes—Wheat Support Program under the 1962 and 1964 Amendments to the Agricultural Adjustment Act of 1938, 7 U.S.C.A. §§ 1331-40 and §§ 1379a-j (1964 ed. and Supp. 1965)

THE AGRICULTURAL ADJUSTMENT ACT OF 1938

GENERAL PROVISIONS

Sec.

1281. Short title.

1282. Declaration of policy.

* * * *

SUBCHAPTER II.—LOANS, PARITY PAYMENTS, CONSUMER SAFEGUARDS, MARKETING QUOTAS, AND MARKETING CERTIFICATES

A. Definition, Loans, Parity Payments, and Consumer Safeguards

1301. Definitions.

(a) General definitions.

(b) Definitions applicable to one or more commodities.

(c) Use of Federal statistics.

(d) Exclusion of stocks of certain commodities.

1301a. References to parity prices, etc., in other laws after January 1, 1950.

1301b, 1302. Repealed.

1303. Parity payments.

1304. Consumer safeguards.

* * * *

* * * *

Part III—Marketing Quotas—Wheat

§1331. Legislative finding of effects on interstate and foreign commerce and necessity of regulation

§1332. National marketing quota—Proclamation; duration of program

(a) Whenever prior to April 15 in any calendar year the Secretary determines that the total supply of wheat in the marketing year beginning in the next succeeding calendar year will, in the absence of a marketing quota program, likely be excessive, the Secretary shall proclaim that a national marketing quota for wheat shall be in effect for such marketing year and for either the following marketing year or the following two marketing years, if the Secretary determines and declares in such proclamation that a two- or three-year marketing quota program is necessary to effectuate the policy of the chapter.

Amount; minimum

(b) If a national marketing quota for wheat has been proclaimed for any marketing year, the Secretary shall determine and proclaim the amount of the national marketing quota for such marketing year not earlier than January 1 or later than April 15 of the calendar year preceding the year in which such marketing year begins. The amount of the national marketing quota for wheat for any marketing year shall be an amount of wheat which the Secretary estimates (i) will be utilized during such marketing year for human consumption in the United States as food, food products, and beverages, composed wholly or partly of wheat, (ii) will be utilized during such marketing year in the United States for seed, (iii) will be exported either in the form of wheat or products thereof, and (iv) as the average amount which was utilized as livestock (including poultry) feed in the marketing years beginning in 1959 and 1960; less (A) an amount of wheat equal to the estimated imports of wheat into the United States during such marketing year and,

(B) if the stocks of wheat owned by the Commodity Credit Corporation are determined by the Secretary to be excessive, an amount of wheat determined by the Secretary to be a desirable reduction in such marketing year in such stocks to achieve the policy of the chapter: *Provided*, That if the Secretary determines that the total stocks of wheat in the Nation are insufficient to assure an adequate carryover for the next succeeding marketing year, the national marketing quota otherwise determined shall be increased by the amount the Secretary determines to be necessary to assure an adequate carryover: *And provided further*, That the national marketing quota for wheat for any marketing year shall be not less than one billion bushels.

National emergencies or material increase in demand; investigation; increase or termination

(c) If, after the proclamation of a national marketing quota for wheat for any marketing year, the Secretary has reason to believe that, because of a national emergency or because of a material increase in the demand for wheat, the national marketing quota should be terminated or the amount thereof increased, he shall cause an immediate investigation to be made to determine whether such action is necessary in order to meet such emergency or increase in the demand for wheat. If, on the basis of such investigation, the Secretary finds that such action is necessary, he shall immediately proclaim such finding and the amount of any such increase found by him to be necessary and thereupon such national marketing quota shall be so increased or terminated. In case any national marketing quota is increased under this subsection, the Secretary shall provide for such increase by increasing acreage allotments established under this part by a uniform percentage. Feb. 16, 1938, c. 30, Title III, § 332, 52 Stat. 53; Aug. 28, 1954, c. 1041, Title III, § 307, 68 Stat. 903; Sept. 27, 1962, Pub. L. 87—703, Title III, § 311, 76 Stat. 619.

§ 1333. National acreage allotment

Whenever the amount of the national marketing quota for wheat is proclaimed for any marketing year, the Secretary

at the same time shall proclaim a national acreage allotment for the crop of wheat planted for harvest in the calendar year in which such marketing year begins. The amount of the national acreage allotment for any crop of wheat shall be the number of acres which the Secretary determines on the basis of expected yields and expected underplantings of farm acreage allotments will, together with (1) the expected production on the increases in acreage allotments for farms based upon small-farms base acreages pursuant to section 1335 of this title, and (2) the expected production on increased acreages resulting from the small-farm exemption pursuant to section 1335 of this title, make available a supply of wheat equal to the national marketing quota for wheat for such marketing year. Feb. 16, 1938, c. 30, Title III, § 333, 52 Stat. 53; June 20, 1938, c. 518, 52 Stat. 775; July 26, 1939, c. 377, 53 Stat. 1125; July 3, 1948, c. 827, Title II, § 207(b), 62 Stat. 1257; Sept. 27, 1962, Pub. L. 87—703, Title III, § 312, 76 Stat. 620.

§ 1334. Apportionment of national acreage allotment

(a) Apportionment among States; overplanted allotments; special acreage reserve

(b) Apportionment among counties; overplanted allotments

(c) Apportionment among farms; overplanted allotments; reductions; notice

(d) Farms on which the entire amount of farm marketing excess has been delivered to the Secretary or stored in accordance with regulations to avoid or postpone payment of penalty

(e) Increase in acreage allotments and marketing quotas for class II durum wheat

(f) Voluntary surrender of acreage allotment

(g) Plantings in excess of allotments or where no allotment is established

(h) Omitted

(i) Increase in acreage allotments for any kind of wheat in short supply; storage reduction and land-use provisions inapplicable to such wheat

(j) Increase in California acreage allotments and marketing quotas for 1958 through 1963 crops of durum wheat; land-use provisions inapplicable to such wheat

(k) Transfer of farm wheat acreage allotments in case of natural disasters

§ 1334a. Summer fallow crop rotation; adjustment of acreage allotment

§ 1334b. Designation of States outside commercial wheat-producing areas

§ 1335. Small-farm exemption; small-farm base acreage; election; acreage allotment; land-use provisions; price support; wheat marketing certificates

§ 1336. Referendum

§ 1337. Repealed.

§ 1338. Transfer of quotas

§ 1339. Land use—Diverted acreage; producers eligible for certificates; conservations uses; amount; annual identity; grazing

(a) (1) As a condition of eligibility for wheat marketing certificates with respect to any farm, the producers on such farm shall be required to divert from the production of wheat to an approved conservation use an acreage of cropland on the farm equal to the number of acres determined by multiplying the farm acreage allotment by the diversion factor, and to participate in any program formulated under subsection (b) to the extent prescribed by the Secretary. Such diversion factor shall be determined by dividing the number of acres by which the national acreage allotment is

reduced below fifty-five million acres by the number of acres in the national acreage allotment.

Payment program for 1964 and 1965 crops; terms and conditions; amounts; additional diverted acreage; conservation and soil-conserving uses; adjustments; knowledge of exceeding acreage allotment; acreage allotment not exceeded by delivery to Secretary of farm marketing excess or storage in accordance with regulations to avoid or postpone payment of penalty or by farms exempt from marketing quota; new farms ineligible for payments; sharing and medium of payments

(b) The Secretary is authorized to formulate and carry out a program with respect to the 1964 and 1965 crops of wheat under which, subject to such terms and conditions as he determines are desirable to effectuate the purposes of this section, payments may be made in amounts not in excess of 50 per centum of the estimated basic county support rate for wheat not accompanied by marketing certificates on the normal production of the acreage diverted taking into account the income objectives of the chapter, determined by the Secretary to be fair and reasonable with respect to acreage diverted pursuant to subsection (a) of this section. Any producer who complies with his 1964 farm acreage allotment for wheat and with the other requirements of the program shall be eligible to receive payments under the program for the 1964 crop of wheat. The Secretary may permit producers on any farm to divert from the production of wheat an acreage, in addition to the acreage diverted pursuant to subsection (a) of this section, equal to 20 per centum of the farm acreage allotment for wheat: *Provided*, That the producers on any farm may, at their election, divert such acreage in addition to the acreage diverted pursuant to subsection (a) of this section, as will bring the total acreage diverted on the farm to fifteen acres. Such program shall require (1) that the diverted acreage shall be devoted to conservation uses approved by the Secretary; (2) that the total acreage of cropland on the farm devoted to soil-conserving uses, including summer fallow and idle

land but excluding the acreage diverted as provided above, shall be not less than the total average acreage of cropland devoted to soil-conserving uses including summer fallow and idle land on the farm during a representative period, as determined by the Secretary, adjusted to the extent the Secretary determines appropriate for (i) abnormal weather conditions or other factors affecting production, (ii) established crop-rotation practices on the farm, (iii) participation in other Federal Farm programs, (iv) unusually high percentage of land on the farm devoted to conserving uses, and (v) other factors which the Secretary determines should be considered for the purpose of establishing a fair and equitable soil-conserving acreage for the farm; and (3) that the producer shall not knowingly exceed (i) any farm acreage allotment in effect for any commodity produced on the farm, and (ii) except as the Secretary may by regulations prescribe, with the farm acreage allotments on any other farm for any crop in which the producer has a share: *Provided*, That no producer shall be deemed to have exceeded a farm acreage allotment for wheat if the entire amount of the farm marketing excess is delivered to the Secretary or stored in accordance with applicable regulations to avoid or postpone payment of the penalty: *And provided further*, That no producer shall be deemed to have exceeded a farm acreage allotment for any crop of wheat if the farm is exempt from the farm marekting quota for such crop under section 1335 of this title. The producers on a new farm shall not be eligible for payments among producers on the farm on a fair and equitable basis. Payments may be made in cash or in wheat.

(c) Adjustment of payments

(d) Advance payments

(e) Diverted acreage used for production of certain crops; rate of payments; limitation on rate; price support unavailable for such crops

(f) Additional terms and conditions

Regulations

(g) The Secretary is authorized to promulgate such regulations as may be desirable to carry out the provisions of this section.

Commodity Credit Corporation funds and appropriations for payments and administrative expenses

(h) The Commodity Credit Corporation is authorized to utilize its capital funds and other assets for the purpose of making the payments authorized in this section and to pay administrative expenses necessary in carrying out this section during the period ending June 30, 1965. There is authorized to be appropriated such amounts as may be necessary thereafter to pay such administrative expenses. Feb. 16, 1938, c. 30, Title III, §339, as added Sept. 27, 1962, Pub. L. 87-703, Title III, §318, 76 Stat. 622, as amended Apr. 11, 1964, Pub. L. 88-297, Title II, §202 (7)—(9), 78 Stat. 179.

§ 1339a. Diversion programs; good faith performance; payments

§ 1339b. Wheat diversion programs; credits in establishment of State, county and farm acreage allotments for wheat

§ 1339c. Feed grains diversion programs for 1964 and subsequent years; feed grain acreage considered wheat acreage and wheat acreage considered feed grain acreage

§ 1340. Supplement provisions relating to wheat marketing quotas; marketing penalty for rice; crop loans on cotton, wheat, rice, tobacco, and peanuts.

* * * *

* * * *

D. WHEAT MARKETING ALLOCATION

§ 1379a. Legislative findings.

Wheat, in addition to being a basic food, is one of the great export crops of American agriculture and its produc-

tion for domestic consumption and for export is necessary to the maintenance of a sound national economy and to the general welfare. The movement of wheat from producer to consumer, in the form of the commodity or any of the products thereof, is preponderantly in interstate and foreign commerce. Unreasonably low prices of wheat to producers impair their purchasing power for nonagricultural products and place them in a position of serious disparity with other industrial groups. The conditions affecting the production of wheat are such that without Federal assistance, producers cannot effectively prevent disastrously low prices for wheat. It is necessary, in order to assist wheat producers in obtaining fair prices, to regulate the price of wheat used for domestic food and for exports in the manner provided in sections 1379a—1379j of this title. Feb. 16, 1938, c. 30, Title III, § 379a, as added Sept. 27, 1962, Pub. L. 87—703, Title III, § 324(2), 76 Stat. 626.

§ 1379b. Wheat marketing allocation for 1964 and 1965; amount; national allocation percentage

A wheat marketing allocation program as provided in sections 1379a-1379j of this title shall be in effect for the marketing years for the 1964 and 1965 crops. Whenever a wheat marketing allocation program is in effect for any marketing year the Secretary shall determine (1) the wheat marketing allocation for such year which shall be the amount of wheat he estimates will be used during such year for food products for consumption in the United States and that portion of the amount of wheat which he estimates will be exported in the form of wheat or products thereof during the marketing year on which the Secretary determines that marketing certificates shall be issued to producers in order to achieve, insofar as practicable, the price and income objectives of sections 1379a-1379j of this title, and (2) the national allocation percentage for such year which shall be the percentage which the national marketing allocation is of the national marketing quota proclaimed for the 1964 crop, less the expected production on the acreage allotments for farms which will not be in compliance with the requirements of the program. Each

farm shall receive a wheat marketing allocation for such marketing year equal to the number of bushels obtained by multiplying the number of acres in the farm acreage allotment for wheat by the normal yield of wheat for the farm as determined by the Secretary, and multiplying the resulting number of bushels by the national allocation percentage. Feb. 16, 1938 c. 30, Title III, §3796, as added Sept. 27, 1962, Pub. L. 87-703, Title III, §324(2), 76 Stat. 626, as amended Apr. 11, 1964, Pub. L. 88-297, Title II, §202 (10), 78 Stat. 179.

§ 1379c. Marketing certificates—Issuance; amount; reduction; sharing among producers; domestic and export certificates

(a) The Secretary shall provide for the issuance of wheat marketing certificates for each marketing year for which a wheat marketing allocation program is in effect for the purpose of enabling producers on any farm with respect to which certificates are issued to receive, in addition to the other proceeds from the sale of wheat, an amount equal to the value of such certificates. The wheat marketing certificates issued with respect to any farm for any marketing year shall be in the amount of the farm wheat marketing allocation for such year, but not to exceed (i) the actual acreage of wheat planted on the farm for harvest in the calendar year in which the marketing year begins multiplied by the normal yield of wheat for the farm, plus (ii) the amount of wheat stored under subsection (b) of this section or to avoid or postpone a marketing quota penalty, which is released from storage during the marketing year on account of underplanting or underproduction, and if this limitation operates to reduce the amount of wheat marketing certificates which would otherwise be issued with respect to the farm, such reduction shall be made first from the amount of export certificates which would otherwise be issued. The Secretary shall provide for the sharing of wheat marketing certificates among producers on the farm on the basis of their respective shares in the wheat crop produced on the farm, or the proceeds therefrom. The Secretary shall, in accordance

with such regulation as he may prescribe, provide for the issuance of domestic marketing certificates for the portion of the wheat marketing allocation representing wheat used for food products for consumption in the United States and for the issuance of export marketing certificates for the portion of the wheat marketing allocation used for exports.

Producers eligible for certificates; storage conditions

(b) No producer shall be eligible to receive wheat marketing certificates with respect to any farm for any marketing year in which a marketing quota penalty is assessed for any commodity on such farm or in which the farm has not complied with the land-use requirements of section 1339 of this title to the extent prescribed by the Secretary, or in which, except as the Secretary may by regulation prescribe, the producer exceeds the farm acreage allotment on any other farm for any commodity in which he has an interest as a producer. No producer shall be deemed to have exceeded a farm acreage allotment for wheat if the entire amount of the farm marketing excess is delivered to the Secretary or stored in accordance with applicable regulations to avoid or postpone payment of the penalty. No producer shall be deemed to have exceeded the farm acreage allotment for wheat on any other farm, if such farm is exempt from the farm marketing quota for such crop under section 1335 of this title. For purposes of this section, but not for purposes of diversion payments under subsection (b) of section 1339 of this title, a producer shall be deemed not to have exceeded the farm acreage allotment for wheat if the acreage in excess of the farm acreage allotment does not exceed 50 per centum of the farm acreage allotment and the amount of wheat produced on the acreage in excess of the farm acreage allotments is stored in accordance with regulations issued by the Secretary. The amount of wheat required to be stored hereunder shall be an amount equal to twice the normal yield of wheat per acre established for the farm multiplied by the number of acres of such crop of wheat on the farm in excess of the farm acreage allotment for such crop unless the producer, in accordance with regulations prescribed by the Secretary and within the time prescribed therein, establishes to the

satisfaction of the Secretary the actual production of such crop of wheat on the farm. If such actual production is so established, the amount of wheat required to be stored shall be such actual production less the actual production of the farm wheat acreage allotment based upon the average yield per acre for the entire wheat acreage on the farm: *Provided however*, That the amount of wheat required to be stored shall not be larger than the amount by which the actual production so established exceeds the normal production of the farm wheat acreage allotment. At the time and to the extent of any depletion in the amount of wheat so stored, except depletion resulting from the release of wheat from storage on account of underplanting or underproduction, as provided below or depletion resulting from some cause beyond the control of the producer, the producer shall pay an amount to the Secretary equal to one and one-half times the value of the wheat marketing certificates issued with respect to the farm for the year in which the wheat on the acreage in excess of the allotment was produced. Whenever the planted acreage of the then current crop of wheat on the farm is less than the farm acreage allotment, the total amount of wheat from any previous crops stored hereunder or stored in order to avoid or postpone a marketing quota penalty shall be reduced by that amount which is equal to the normal production of the number of acres by which the farm acreage allotment exceeds the planted acreage, and whenever the actual production of the acreage of wheat is less than the normal production of the farm acreage allotment, the total amount of wheat from any previous crops stored hereunder or in order to avoid a marketing quota penalty shall be reduced by that amount which together with the actual production of the then current crop will equal the normal production of the farm acreage allotment.

Face value

(c) The Secretary shall determine and proclaim for each marketing year the face value per bushel of wheat marketing certificates. The face value per bushel of domestic certificates shall be the amount by which the level of price support for wheat accompanied by domestic certificates ex-

ceeds the level of price support for wheat not accompanied by certificates (noncertificate wheat); and the face value per bushel of export certificates shall be the amount by which the level of price support for wheat accompanied by export certificates exceeds the level of price support for noncertificate wheat.

Statement or form of certificates and transfers

(d) Marketing certificates and transfers thereof shall be represented by such documents, marketing cards, records, accounts, certifications, or other statements or forms as the Secretary may prescribe. Feb. 16, 1938, c. 30, Title III, § 379c, as added Sept. 27, 1962, Pub. L. 87-703, Title III, § 324(2), 76 Stat. 627, as amended Apr. 11, 1964, Pub. L. 88-297, Title II, § 202(12)-(14), 78 Stat. 180, 181.

§ 1379d. Marketing restrictions—Transfers of certificates; purchases by Commodity Credit Corporation

(a) Marketing certificates shall be transferable only in accordance with regulations prescribed by the Secretary. Any unused certificates legally held by any person shall be purchased by Commodity Credit Corporation if tendered to the Corporation for purchase in accordance with the regulations prescribed by the Secretary.

Processor and exporter acquisition of domestic and export certificates; international trade, expansion; refunds or credits for certificates; exemptions from requirements

(b) During any marketing year for which a wheat marketing allocation program is in effect, (i) all persons engaged in the processing of wheat into food products shall, prior to marketing any such food product or removing such food product for sale or consumption, acquire domestic marketing certificates equivalent to the number of bushels of wheat contained in such product and (ii) all persons export-

ing wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. In order to expand international trade in wheat and wheat flour and promote equitable and stable prices therefor the Commodity Credit Corporation shall, upon the exportation from the United States of any wheat or wheat flour, make a refund to the exporter or allow him a credit against the amount payable by him for marketing certificates, in such amount as the Secretary determines will make United States wheat and wheat flour generally competitive in the world market, avoid disruption of world market prices, and fulfill the international obligations of the United States. The Secretary may exempt wheat exported for donation abroad and other noncommercial exports of wheat and wheat processed for use on the farm where grown from the requirements of this subsection. Marketing certificates shall be valid to cover only sales or removals for sale or consumption or exportations made during the marketing year with respect to which they are isued, and after being once used to cover a sale or removal for sale or consumption or export of a food product or an export of wheat shall be void and shall be dispsed of in accordance with regulations prescribed by the Secretary. Notwithstanding the foregoing provisions hereof, the Secretary may require marketing certificates issued for any marketing year to be acquired to cover sales, removals, or exportations made on or after the date during the calendar year in which wheat harvested in such calendar year begins to be marketed as determined by the Secretary even though such wheat is marketed prior to the beginning of the marketing year, and marketing certificates for such marketing year shall be valid to cover sales, removals, or exportations made on or after the date so determined by the Secretary.

Undertaking to secure marketing of commodity without certificate

(c) Upon the giving of a bond or other undertaking satisfactory to the Secretary to secure the purchase of and pay-

ment for such marketing certificates as may be required, and subject to such regulations as he may prescribe, any person required to have marketing certificates in order to market or export a commodity may be permitted to market any such commodity without having first acquired marketing certificates.

"Food products" defined

(d) As used in sections 1379a-1379j of this title, the term "food products" means flour, semolina, farina, bulgur, beverage, and any other product composed wholly or partly of wheat which the Secretary may determine to be a food product. Feb. 16, 1938, c. 30, Title III, §379d, as added Sept. 27, 1962, Pub. L. 87-703, Title III, §324(2), 76 Stat. 628, as amended Apr. 11, 1964, Pub. L. 88-297, Title II, §202(15)-(17), 78 Stat. 181, 182.

§ 1379e. Assistance in purchase and sale of marketing certificates; regulations; administrative expenses; interest

For the purpose of facilitating the purchase and sale of marketing certificates, the Commodity Credit Corporation is authorized to issue, buy, and sell marketing certificates in accordance with regulations prescribed by the Secretary. Such regulations may authorize the Corporation to issue and sell certificates in excess of the quantity of certificates which it purchases. Such regulations may authorize the Corporation in the sale of marketing certificates to charge, in addition to the face value thereof, an amount determined by the Secretary to be appropriate to cover estimated administrative costs in connection with the purchase and sale of the certificates and estimated interest incurred on funds of the Corporation invested in certificates purchased by it. Feb. 16, 1938, c. 30, Title III § 379e, as added Sept. 27, 1962, Pub. L. 87-703, Title III, § 324(2), 76 Stat. 628.

§ 1379f. Conversion factors

The Secretary shall establish conversion factors which shall be used to determine the amount of wheat contained

in any food product. The conversion factor for any such food product shall be determined upon the basis of the weight of wheat used in the manufacture of such product. Feb. 16, 1938, c. 30, Title III, § 379f, as added Sept. 27, 1962, Pub. L. 87-703, Title III, § 324(2), 76 Stat. 629.

§ 1379g. Authority to facilitate transition

The Secretary is authorized to take such action as he determines to be necessary to facilitate the transition from the program currently in effect to the program provided for in sections 1379a-1379j of this title. Notwithstanding any other provision of such sections, such authority shall include, but shall not be limited to, the authority to exempt all or a portion of the wheat or food products made therefrom in the channels of trade on the effective date of the program under such sections from the marketing restrictions in subsection (b) of section 1379d of this title, or to sell certificates to persons owning such wheat or food products at such prices as the Secretary may determine. Any such certificate shall be issued by Commodity Credit Corporation. Feb. 16, 1938, c. 30, Title III, § 379g, as added Sept. 27, 1962, Pub. L. 87-703, Title III, § 324(2), 76 Stat. 629.

§ 1379h. Applicability of provisions to designated persons; reports and records; examinations by the Secretary

This section shall apply to processors of wheat, warehousemen and exporters of wheat and food products, and all persons purchasing, selling, or otherwise dealing in wheat marketing certificates. Any such person shall, from time to time on request of the Secretary, report to the Secretary such information and keep such records as the Secretary finds to be necessary to enable him to carry out the provisions of sections 1379a-1379j of this title. Such information shall be reported and such records shall be kept in such manner as the Secretary shall prescribe. For the purpose of ascertaining the correctness of any report made or record kept, or of

obtaining information required to be furnished in any report, but not so furnished, the Secretary is authorized to examine such books, papers, records, accounts, correspondence, contracts, documents, and memorandums as he has reason to believe are relevant and are within the control of such person. Feb. 16, 1938, c. 30, Title III, § 379h, as added Sept. 27, 1962, Pub. L. 87-703, Title III, § 324(2), 76 Stat. 629.

§ 1379i. Penalties—Forfeitures; amount; civil action

(a) Any person who violates or attempts to violate or who participates or aids in the violation of any of the provisions of subsection (b) of section 1379d of this title shall forfeit to the United States a sum equal to two times the face value of the marketing certificates involved in such violation. Such forfeiture shall be recoverable in a civil action brought in the name of the United States.

Misdemeanors; punishment

(b) Any person, except a producer in his capacity as a producer, who violates or attempts to violate or who participates or aids in the violation of any provision of sections 1379a-1379j of this title, or of any regulation, governing the acquisition, disposition, or handling of marketing certificates or who fails to make any report or keep any record as required by section 1379h of this title shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $5,000 for each violation.

Forfeiture of right to receive certificates; payment of face value

(c) Any person who, in his capacity as a producer, knowingly violates or attempts to violate or participates or aids in the violation of any provision of sections 1379a-1379j of this title, or of any regulation, governing the acquisition, disposition, or handling of marketing certificates or fails to make any report or keep any record as required by section 1379h of this title shall, (i) forfeit any right to receive marketing

certificates, in whole or in part as the Secretary may determine, with respect to the farm or farms and for the marketing year with respect to which any such act or default is committed, or (ii), if such marketing certificates have already been issued, pay to the Secretary, upon demand, the amount of the face value of such certificates, or such part thereof as the Secretary may determine. Such determination by the Secretary with respect to the amount of such marketing certificates to be forfeited or the amount to be paid by such producer shall take into consideration the circumstances relating to the act or default committed and the seriousness of such act or default.

Felonies; punishment

(d) Any person who falsely makes, issues, alters, forges, or counterfeits any marketing certificates, or with fraudulent intent possesses, transfers, or uses any such falsely made, issued, altered, forged, or counterfeited marketing certificate, shall be deemed guilty of a felony and upon conviction thereof shall be subject to a fine of not more than $10,000 or imprisonment of not more than ten years, or both. Feb. 16, 1938, c. 30, Title III, § 379i, as added Sept. 27, 1962, Pub. L. 87-703, Title III, § 324(2), 76 Stat. 629.

§ 1379j. Regulations

The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of section 1379a-1379j of this title including but not limited to regulations governing the acquisition, disposition, or handling of marketing certificates. Feb. 16, 1938, c. 30, Title III, § 379j, as added Sept. 27, 1962, Pub. L. 87-703, Title III, § 324(2), 76 Stat. 629.

* * * * *

2. Regulations—Processor Wheat Marketing Certificate Regulations, 7 C.F.R. § § 777.2—.17 (1965 ed.)

PROCESSOR WHEAT MARKETING CERTIFICATE REGULATIONS

Authority: The provisions of this Part 777 issued under secs. 379a to 379j, 52 Stat. 31, as amended by 76 Stat. 626 and 78 Stat. 179; 7 U.S.C. 1379a-j.

§ 777.2 Administration.

§ 777.3 Definitions.

As used in the regulations in this part and in all instructions, forms, and documents pertaining hereto, the words and phrases defined in this section shall have the meaning assigned to them as follows, unless the context or subject matter otherwise requires:

(a) "Wheat" means wheat (regardless of whether produced in the United States), as defined in the Official Grain Standards of the United States or any wheat contained in any mixed grain or in any other mixture, which if not contained in such mixture would qualify as wheat under such standards.

(b) "Food product" means:

(1) Any product processed in whole or in part from wheat, irrespective of whether such product is actually used for human consumption; except such products as are defined herein as non-food products. Such food products shall, except as provided in paragraph (c) (3) of this section, include but not be limited to the following:

(i) Flour, as defined herein.

(ii) Wheat which is boiled, pearled, steeped, or commercially sprouted.

(iii) Any breakfast cereal.

(iv) Any beverage.

(v) Cracked wheat (wheat grits), ground wheat, crushed wheat, rolled wheat or flaked wheat (toasted or untoasted, other than breakfast cereal) or such other similarly processed wheat as may be designated by the Administrator, except to the extent that the total product of the wheat processed is used in or marketed as animal feed or other non-food product. To qualify as ground wheat not more than 70 percent of such total product shall pass through a No. 8 sieve, and not more than 30 percent of such total product shall pass through a No. 20 sieve.

(c) "Non-food product" means:

(1) Any of the following products when produced in a single plant from wheat, provided (i) none of the products obtained from the wheat used in the processing of such product is marketed, or removed from the plant for sale or consumption, as a food product, (ii) the product is not manufactured from only a part of the total flour streams obtained in the processing of patent flours, and (iii) the product is labeled or otherwise identified as a non-food product.

(*a*) Animal food;

(*b*) Pet food and poultry feed;

(*c*) Adhesives and other industrial products unsuitable for human consumption;

(*d*) Any product marketed or removed from the plant for use as a component of the products listed in subdivisions (*a*), (*b*), or (*c*) of this subdivision if such product is unsuitable for marketing as a food product because of ingredients added or other action taken during the total course of processing.

(2) Cracked wheat (wheat grits), ground wheat, crushed wheat, rolled wheat or flaked wheat (toasted or untoasted, other than breakfast cereal) or other similarly processed wheat designated by the Administrator to the extent that the total product of the wheat processed is used in or marketed as animal feed or other nonfood product specified in this paragraph.

(3) Any product which prior to marketing or removal for sale or consumption, is determined to be unfit for human consumption by the Food and Drug Administration or any agency of a State or local government, has not been rendered unfit for human consumption by deliberate action on the part of the processor and is destroyed or disposed of for animal feed or other non-food use; or any product processed from wheat determined to be unfit for human consumption by any such agency, if the product is destroyed or disposed of for animal feed or other non-food use.

(4) Any product, being manufactured as a food product which in the course of processing inadvertently, and not by design or deliberate action on the part of the processor, becomes unsuitable for marketing as the food product originally intended to be produced, provided such product and all other products obtained from the wheat are destroyed, or prior to marketing or removal from the plant are unsuitable for marketing as a food product and are used in or marketed as animal feed or other non-food products specified in this paragraph.

(5) Such other products processed from wheat as the Administrator may determine to be non-food products.

(d) "Flour" means all flour (including flour clears) processed in whole or in part from wheat and shall include whole wheat or graham flour, Durum flour, malted wheat flour, stone ground flour, self-rising flour, semolina, farina and bulgur.

(e) "Person" means an individual, corporation, partnership, association, State agency, municipality or any other legal entity.

(f) "Food processor" means any person who processes wheat into a food product, irrespective of whether or not his principal business activity is that of a food processor. An individual who processes wheat in his own home for family use in his home is not a food processor.

(g) A "plant" or "processing plant" means collectively all processing units under one roof or located adjacent to each other except that (1) any such unit or units producing animal feed or other non-food product exclusively shall be considered a separate plant and (2) any such unit or units processing durum wheat exclusively shall be considered a separate plant.

(h) "United States" means all the States in the United States, the District of Columbia and Puerto Rico, including any Free Trade zones located therein.

(i) "Bushel" means 60 pounds of wheat, exclusive of dockage as defined in the Official Grain Standards of the United States or 60 pounds of wheat which is contained in mixed grain or in any mixture.

(j) "Domestic certificate" or "certificate" means a Form CCC-145, Wheat Marketing Certificate (domestic) issued by CCC or a certificate credit established by CCC in its accounts in favor of a food processor for certificates purchased pursuant to these regulations.

(k) "Marketing year" means the twelve months beginning July 1, and ending June 30.

* * * * *

[29 F.R. 6271, May 13, 1964, as amended at 29 F.R. 7984, June 24, 1964, 29 F.R. 11643, Aug. 14, 1964; 29 F.R. 13471, Sept. 30, 1964, 29 F.R. 17087, Dec. 15, 1964]

§ 777.4 Applicability of certificate requirements.

(a) *General.* Any food processor processing wheat into food products, as defined herein, in the United States on or after 12:01 a.m. local time, July 1, 1964, regardless of whether he has legal title to the wheat or the food product processed therefrom, shall for the wheat so processed acquire and surrender certificates to CCC at the time and in the manner hereinafter specified in these regulations. The costs of domestic certificates for the marketing year beginning July 1, 1964, shall be 70 cents per bushel except to the extent that

the processor qualifies for transition certificates under §777.6. The cost of domestic certificates for the marketing year beginning July 1, 1965, shall be 75 cents per bushel.

(b) *Exemptions.* Notwithstanding the foregoing, certificates shall not be required in the circumstances specified in the following subparagraphs:

(1) *Farm-use exemption* * * *

(2) *Wheat processed in bond* * * *

(3) *Custom or toll processing for the Department of Agriculture* * * *

(4) *Processing by educational institutions or other persons for purposes of student training, experimentation, research, analysis or testing* * * *

[29 F.R. 6272, May 13, 1964, as amended at 29 F.R. 7984, June 24, 1964, 29 F.R. 11643, Aug. 14, 1964; 29 F.R. 13471, Sept. 30, 1964]

§ 777.5 Registration of processors.

(a) *Time of registration.* Any person who processes wheat, either into a food product or non-food product, except a person who processes wheat solely for use on the farm where grown or an individual who processes wheat in his own home for family use in his home, shall register with the Director (see paragraph (1), § 777.3) by making the report required by paragraph (b) of this section by May 30, 1964, or such later date as may be approved by the Director in writing. Any such person who begins such processing operations subsequent to May 20, 1964, and who is not registered, shall register not later than the date he commences operations. Any person who has registered with the Director and who modifies his operations, such as by opening or closing plants, or beginning to process food products, subsequent to the date of his registration, shall give notice of such change to the Director not later than the date he modifies his operations.

(b) *Method of registration* * * *

(c) *Notification of registration by Director* * * *

[29 F.R. 6272, May 13, 1964, as amended at 29 F.R. 11643, Aug. 14, 1964]

§ 777.6 Transition.

(a) *General.* It has been determined necessary to facilitate the transaction from the 1963 program to the 1964 marketing allocation program by reducing the cost of domestic certificates from 70 cents per bushel to 18 cents per bushel on certain wheat produced and stored in the United States and processed into food products on and after July 1, 1964. Such reduced cost certificates shall hereinafter be referred to as "transition certificates".

(b) *Eligible persons* * * *

(c) *Quantity eligible for transition certificates* * * *

(d) *Transition certificates* * * *

(e) *Submission of reports* * * *

(f) *Transition Records to be retained by food processor* * * *

(h) *Failure to act in good faith* * * *

[29 F.R. 6272, May 13, 1964, as amended at 29 F.R. 7984, June 24, 1964, 29 F.R. 11643, Aug. 14, 1964]

§ 777.7 Refunds or credits for flour exports.

(a) *General* * * *

(b) *Exports under GR-262* * * *

(c) *Exports of food products other than flour* * * *

[29 F.R. 7984, June 24, 1964]

§ 777.8 Penalties.

(a) *Violation of marketing restrictions—forfeitures.* Any person who violates or attempts to violate or who participates or aids in the violation of any of the provisions of these regulations with regard to the acquisition of certificates prior to marketing any such food product or removing such

food product for sale or consumption shall be subject to section 379i(a) of the Agricultural Adjustment Act of 1938 which provides for the forfeiture to the United States by such person of a sum equal to two times the face value of the certificates involved in such violation. Such forfeiture shall be recoverable in a civil action brought in the name of the United States.

(b) *Violation of marketing restrictions; failure to make reports or maintain records—criminal penalties.* Any person, except a producer in his capacity as a producer, who violates or attempts to violate or who participates or who aids in the violation of any provision of these regulations governing the acquisition, disposition or handling of certificates or who fails to make any report or keep any record as required by these regulations shall be subject to the provisions of section 379i(b) of the Agricultural Adjustment Act of 1938 which state that such person shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than five thousand dollars for each violation.

(c) *Fraudulent use of marketing certificates.* Any person who falsely makes, issues, alters, forges or counterfeits any certificate, or with fraudulent intent possesses, transfers, or uses such falsely made, issued, altered, forged or counterfeited certificate, shall be subject to the provisions of section 379i(c) of Agricultural Adjustment Act of 1938 which state that such person shall be deemed guilty of a felony and upon conviction thereof shall be subject to a fine of not more than ten thousand dollars or imprisonment of not more than ten years, or both.

[29 F.R. 6273, May 13, 1964]

APPENDIX I

PROCESSOR WHEAT MARKETING CERTIFICATE REGULATIONS

Instructions to Processors for Preparation of Wheat Transition Report Forms

* * * *

[29 F.R. 6273, May 13, 1964, as amended at 29 F.R. 7984, June 24, 1964]

§ 777.9 Semi-processed wheat* * *

[29 F.R. 7985, June 24, 1964, 29 F.R. 11643, Aug. 14, 1964; 29 F.R. 13471, Sept. 30, 1964]

§ 777.10 Wheat Marketing Certificate (Domestic)

(a) *Description.* Wheat Marketing Certificates (Domestic), herein called "domestic certificates" or "certificates," shall be represented by Form CCC-145, Wheat Marketing Certificate (Domestic) issued by CCC, or a certificate credit established by CCC in favor of a food processor for certificates purchased from CCC pursuant to these regulations. Form CCC-145 is a serially numbered form entitled "1964 Wheat Marketing Certificate." A Form CCC-145 domestic certificate will be identified as "domestic," will show date of issuance, bushel quantity, face value and name and address of person to whom issued; and will bear the signature of a representative of CCC authorized to sign certificates.

(b) *Sale by CCC* * * *

(c) *Negotiability* * * *

(d) *Surrender of certificates to CCC* * * *

(e) *Balance certificates* * * *

(f) *Purchase by CCC.* Any valid Form CCC-145 certificates legally held by any person will be purchased by CCC at face value if presented for purchase to the Kansas City Commodity Office.

[29 F.R. 7985, June 24, 1964]

§ 777.11 Time and manner of acquiring and surrendering certificates.

(a) *General.* Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in §777.10. The number of certificates acquired by the food processor and surrendered to CCC shall be equivalent to the number of bushels of wheat used in processing the food prod-

ucts for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation.

(b) *Undertaking to secure purchase and payment.* Any food processor may market a food product or remove a food product for sale or consumption without first having acquired and surrendered certificates if he enters into the undertaking with CCC provided in this paragraph and complies with such undertaking. * * *

(c) *Purchase of certificate in absence of undertaking.* (1) Except as provided in paragraph (b) of this section, the food processor must acquire certificates and surrender such certificates to CCC on or before the 15th calendar day after the end of the processing report period, or such later date as may be approved in writing by the Administrator for good cause shown, for all food products sold and removed for sale or consumption from the processing plant, covered by the processing report, during the processing report period. The cost of certificates acquired from CCC shall be as provided in subparagraphs (2), (3), and (4) of this paragraph.

* * * * *

(d) *Wheat acquired from CCC for export as flour under GR-262* * * *

[29 F.R. 7985, June 24, 1964, as amended at 29 F.R. 11643, Aug. 14, 1964, 29 F.R. 17087, Dec. 15, 1964]

§ 777.12 Food processing reports.

(a) *General.* Processing reports shall be submitted to the Kansas City Commodity Office by each food processor as defined in §777.3(f). Descriptions of the processing reports are set forth in §§777.13 and 777.14 and detailed instructions are provided in Appendices II and III.

(b) *Processing report period.* (1) The period of processing operations which a processing report shall cover shall be one of the following:

(i) Each calendar month.

(ii) 4 or 5 week periods in combination.

(iii) Each 4 weeks.

* * * * *

(c) *Date of submittal* * * *

(d) *Basis of reporting.* The weight of wheat basis of reporting prescribed in §777.13 shall be used except that if conversion factors are provided in §777.14 for all the food products processed in the plant (or approved combination of plants as provided in paragraph (e) of this section) covered by the report, the food processor may elect to use the food product conversion factor basis prescribed in §777.14. The basis of reporting used in a food processor's first report, i.e., weight of wheat or conversion factor basis shall be deemed to constitute his election to use such basis for the entire marketing year, and all subsequent reports shall be on such basis, unless the Administrator for good cause, approves a change of the basis of reporting.

(e) *Plant or plants* * * *

(f) *Number of report periods for which submitted* * * *

(g) *Corrected processing reports* * * *

(h) *Reports from persons engaged in the processing of wheat primarily for student training, experimentation, research analysis or testing* * * *

[29 F.R. 7986, June 24, 1964, as amended at 29 F.R. 11643, Aug. 14, 1964; 29 F.R. 13471, Sept. 30, 1964, 29 F.R. 17087, Dec. 15, 1964]

§ 777.13 Weight of wheat basis of reporting.

(a) Food processors reporting the quantity of wheat processed into food products on the basis of the weight of wheat

processed, shall complete Form CCC 160, Processing Report-Weight of Wheat Basis, for each reporting period in accordance with detailed instructions set forth in Appendix II of this part. Determinations of the weight of wheat processed into food products shall be made in the manner prescribed in Appendix II. No deductions may be made for any by-products of a food product obtained in the processing of the wheat.

[29 F.R. 7986, June 24, 1964]

§ 777.14 Conversion factor basis of reporting.

(a) *Report form.* Food processors reporting the quantity of wheat processed into food products on the basis of the application of conversion factors to the weight of food products obtained in the processing operation (herein called "food product conversion factor basis") shall complete Form CCC-159, Processing Report-Conversion Factor Basis, for each reporting period.

(b) *Additional ingredients.* If the food product conversion factor basis of reporting is used to determine the quantity of the wheat processed, such quantity may be reduced by the weight of any additional ingredient included in the weight of the food products which was introduced during the course of processing. "Additional ingredient" for purposes of this paragraph means:

(1) Any flour and other food products including clears and malted wheat flour, which were produced prior to July 1, 1964, or for which certificates have previously been acquired and surrendered to CCC by the processor or for which certificates are required to be acquired and surrendered to CCC for another food processor from which the food product was purchased.

(2) Any non-wheat ingredient including, but not limited to malted barley flour, creta preparata, and self-rising components, but not including moisture used in the tempering of wheat or otherwise introduced in the production of the product.

(c) *Conversion factors.* For purposes of this section, the wheat equivalent of each food product named in column A shall be the number of bushels prescribed as the conversion factor for such product in column B.

A Food product	*B Bushels of wheat-equivalent per 100 pounds of product (conversion factor)*
Whole wheat flour or graham flour	1.700
Flour (including clears) derived from conventional milling practices which are generally accepted in the milling industry in the United States as representing a 72 percent extraction operation	2.283
Malted wheat flour	2.075
Semolina	2.283
Farina	2.283
Bulgur	1.916
Rolled wheat	1.800
Cracked wheat (wheat grits), ground wheat, or crushed wheat	1.700
Heavy bran, type A (extraction approximately 40 percent heavy bran and 50 percent flour)[1]	1.310
Heavy bran, type B (extraction approximately 57 percent heavy bran and 32 percent flour)[1]	1.640
Whole wheat cereal, including fines (extraction approximately 80 precent cereal and 13 percent fines)[2]	2.09
Wheat bits cereal, including fines (extraction approximately 68 percent cereal and 27 percent fines)[2]	2.44
Cracked wheat for cereal, including fines (extraction approximately 59 percent cracked wheat and 27 percent fines)[2]	2.80

[1] The flour produced is subject to the regular conversion factor applicable to a 72 percent extraction operation.

[2] When certificates are acquired for these products based on the conversion factors specified, certificates will be deemed to have been acquired for the fines derived in connection therewith.

(d) *Other conversion factors.* (1) There shall be no conversion factors other than those prescribed in paragraph (c) of this section, except that any food processor may petition the Administrator to establish in the regulations a conversion factor for any additional food product or flour of other rates of extraction.

(2) Any person who wishes to petition for the establishment of a conversion factor for food products other than flour shall submit to the Administrator:

(i) The name and a detailed description of the food product, and

(ii) The conversion factor which is considered to be applicable. (Such factor is to be based upon the quantity of wheat, prior to cleaning, that is required to produce 100 pounds of the particular food product), and

(iii) Evidence to substantiate the recommended conversion factor.

(3) Any person who wishes to petition for the establishment of a conversion factor for flour of other rates of extraction shall submit to the Administrator the rate of extraction for which he desires the establishment of a conversion factor, and a statement to the effect that he mills flour of such rate of extraction.

(e) *Preparation of the report.* Instructions for the preparation of Forms CCC-159 are contained in Appendix III of this part.

[29 F.R. 7987, June 24, 1964; 29 F.R. 11644, Aug. 14, 1964, 29 F.R. 17087, Dec. 15, 1964]

§ 777.15 Records.

Food processors shall establish and maintain for each processing plant or approved combination of plants accurate records and documents which are necessary (a) to determine the total quantity of wheat processed into food products based upon the weight of wheat used in processing food products as provided in § 777.13 and Appendix II or based

upon the application of conversion factors to the weight of food products obtained in the processing operation as provided in § 777.14 and Appendix III, whichever is applicable and (b) to support all reports thereof made to the Kansas City Commodity Office. A food processor shall establish and maintain accurate records of all sales of food products and removals of food products for sale and consumption from the processing plant unless he elects to have all wheat processed during each reporting period considered as having been sold or removed for sale or consumption during such reporting period. The food processor's failure to maintain such records shall constitute his election to have wheat processed during each reporting period considered as having been sold or removed for sale or consumption during such reporting period. Representatives of the U. S. Department of Agriculture may examine the foregoing records and documents and the stocks of wheat and food products in storage or in the processing plant at any time during normal business or working hours. All such records shall be retained for a period of three years.

[29 F.R. 7987, June 24, 1964]

§ 777.16 Casualty losses.

CCC shall make a refund to the food processor or allow him a credit against the amount payable for certificates to the extent of the value of certificates acquired and surrendered to CCC on any food products which the food processor establishes to the satisfaction of the Administrator was destroyed or rendered unmarketable for use as a food product as a result of a fire, casualty, or act of God prior to sale or removal for sale or consumption.

[29 F.R. 7987, June 24, 1964]

§ 777.17 Payments in dispute.

The making of a payment to CCC for certificates, or the surrender of certificates to CCC by a food processor, or the making of an undertaking by the processor pursuant to §777.11, shall not deprive the food processor of any right which he

might otherwise have to assert a claim in the event of a dispute as to the number of certificates, if any, required to be acquired and surrendered by him to CCC or as to the refunds or credits against the cost of certificates to which he or the exporter of flour is entitled on flour exported.

[29 F.R. 7987, June 24, 1964]

APPENDIX II—PROCESSOR WHEAT MARKETING CERTIFICATE REGULATIONS

INSTRUCTIONS FOR THE PREPARATION OF THE PROCESSING REPORT—WEIGHT OF WHEAT BASIS

* * * * *

[29 F.R. 7987, June 24, 1964; 29 F.R. 10495, July 29, 1964]

APPENDIX III—PROCESSOR WHEAT MARKETING CERTIFICATE REGULATIONS

INSTRUCTIONS FOR THE PREPARATION OF THE PROCESSING REPORT—CONVERSION FACTOR BASIS

* * * * *

[29 F.R. 7988, June 24, 1964)

1. Opinion Below

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,794

THE MORRISON MILLING COMPANY, et al., APPELLANTS

v.

ORVILLE L. FREEMAN, et al., APPELLEES

No. 19,795

NATIONAL BISCUIT COMPANY, and
THE QUAKER OATS COMPANY, APPELLANTS,

v.

ORVILLE L. FREEMAN and
COMMODITY CREDIT CORPORATION, APPELLEES

Appeals from the United States District Court
for the District of Columbia

Decided July 18, 1966

Mr. Jerry L. Buchmeyer for The Morrison Milling Company, and certain other appellants in No. 19,794.

Mr. Brice M. Clagett, with whom *Messrs. Howard C. Westwood* and *Cyril V. Smith, Jr.*, were on the brief, for General Mills Inc., and certain other appellants in No. 19,794, and appellants in No. 19,795.

Mr. Carl Eardley, Attorney, Department of Justice, with whom *Messrs. J. William Doolittle*, Attorney, Department of Justice, and *David G. Bress*, United States Attorney, were on the brief, for appellees. *Messrs. Alan S. Rosenthal* and *Richard S. Salzman*, Attorneys, Department of Justice, also entered appearances for appellees.

Before BAZELON, *Chief Judge*, DANAHER and MCGOWAN, *Circuit Judges*.

MCGOWAN, *Circuit Judge:* These appeals from the District Court involve an attack by a number of wheat processors upon regulations issued and observed by the Secretary of Agriculture under the Agricultural Act of 1964. 78 Stat. 177, as amended, 7 U.S.C. §§ 1301 *et seq*. The regulations are asserted to be in direct conflict with the statute and, in any event, arbitrary and capricious. These claims were unavailing in the District Court which, on cross-motions for summary judgment, granted that relief to appellees. The issues raised before us relate solely to the merits; and, for the reasons appearing hereinafter, we affirm the District Court.

I

The controversy is a consequence of a change by Congress in the method of providing financial support for the American wheat grower. Immediately prior to July 1, 1964—the effective date of the statute here in issue—the grower could count on $2.00 per bushel. This was available in the form of (1) a price support loan of $1.82 and (2) a Commodity Credit Corporation payment of 18¢. Under the new scheme, the loan level was reduced to $1.30, and a system of marketing certificates was set up. That scheme provided for an estimate by the Secretary of the national marketing quota of wheat. This included, among other things, estimates of

the amount needed in the manufacture of food products for human consumption in the United States and of the amount to be exported. When the market quota was determined, the Secretary estimated the acreage required to produce it. Certificates of two kinds—domestic and export—were then issued to growers, who met the acreage allotment regulations, for that per cent of their estimated crop which corresponded with the percentages derived from the Secretary's estimates of domestic consumption and export needs. A 70¢ certificate was issued for each bushel of wheat within the grower's allocation for domestic consumption, and a 25¢ certificate for each bushel within the allocation for exporting. The cash to redeem the domestic certificates was to come in the first instance from the processor.

The critical language of the statute which controls the liability of processors for the certificates is the following, 7 U.S.C. § 1379d:

> (b) During any marketing year for which a wheat marketing allocation program is in effect, (i) all persons engaged in the processing of wheat into food products shall, prior to marketing any such food product or removing such food product for sale or consumption, acquire domestic marketing certificates *equivalent to the number of bushels of wheat contained in such product* and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. (Emphasis supplied)

Under an express grant elsewhere in the Act, § 1379j, to prescribe "regulations governing the acquisition, disposition or handling of marketing certificates," the Secretary issued this regulation, 7 C.F.R. § 777.11 (1965):

Time and manner of acquiring and surrendering certificates.

> (a) *General.* Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in § 777.10. The number of certificates

> acquired by the food processor and surrendered to CCC shall be *equivalent to the number of bushels of wheat used in processing the food products* for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§ 777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation. (Emphasis supplied).

It is the juxtaposition of the underlined words in statute and regulation which frames the principal problem presented in this litigation. Appellants urge that the number of bushels of wheat "contained" in a sack of white flour is not the same as the number of bushels "used" in making it. This results primarily from the fact that roughly 18 percent of the components of a kernel of wheat are made up of so-called bran and germ which go into by-products such as animal feeds. There is the further circumstance that a bushel of wheat as delivered to the miller customarily contains impurities and defective kernels which must be screened out, and moisture which is lost both while awaiting processing and in the course of processing itself.

Appellants attack the formula established by the Secretary for computing the amount of wheat for which the processors must buy certificates. The argument to us is, first, that the statute admits of nothing other than the requirement that the processor buy only as many certificates as there are bushels of wheat physically incorporated in the finished flour; and, second, that, even if bran and germ be not eliminated from this computation, the regulations have unreasonably and arbitrarily limited the permissible deduction for impurities and shrinkage. We deal with these issues in turn.

II

Appellants insist that the statutory language is so clear as to bar resort to external aids to interpretation. See

United States v. Missouri Pac. R. Co., 278 U.S. 269 (1929), and our own statement of this proposition in *Elm City Broadcasting Corp. v. United States*, 98 U.S. App. D.C. 314, 319, 235 F. 2d 811, 816 (1956). But this is a doctrine which reflects a highly optimistic view of the human capacity to communicate precise meaning by the written word. There are surely occasions where its invocation is justified, particularly where a covert look may indicate that the appeal from one set of words to another is not very illuminating. It is rare indeed, however, that particular words patently preclude all but one meaning; and courts should be slow to spurn such enlightenment as may be available from any authentic source.

We do not believe that the statutory reference to bushels of wheat "contained in" flour in this context is as clear in its signification as appellants assert. It is not wholly idle to believe that perhaps Congress might have been thinking in terms of bushels of wheat "used in" making flour, as the regulation assumes. It would not be a bizarre employment of ordinary speech for a housewife to say that three quarts of cherries were "contained in" her jam, although, when cross-examined about the stems and the pits and so on, she might readily agree that she had in reality "used in" making the jam three quarts of cherries. We think that, contrary to appellants' claim, an ambiguity lurks in this statute which authorizes us to look beyond its four corners for help in resolving this substantial dispute about its meaning.

Our first look, however, is not outside the Act of which Section 1379d(b) is a part. Domestic marketing certificates are provided for in Section 1379c. The Secretary is directed to arrange "for the issuance of domestic marketing certificates for the portion of wheat marketing allocation representing wheat *used* for food products * * *" (Emphasis supplied). The Secretary is also directed to fix as the value of domestic marketing certificates, the difference between the support level of certificate wheat and the support level of non-certificate wheat. These respective levels as set by

the Secretary were $2.00 and $1.30, respectively, leaving the value of a certificate, as defined in the statute, at 70¢.[1]

The scheme of the statute is that the Secretary was to estimate in advance how many bushels of the annual crop would go into domestic processing. A certificate was to be issued in respect of each bushel in this estimate. A processor must acquire a certificate for each bushel bought by him for processing. The producer of that bushel was paid 70¢ by the Government. If the Government was not to be out of pocket, the processor must pay 70¢ for the certificate.

The District Court was of the view that Congress had been thinking in terms of a rough equivalence between what had to be paid out to the farmers in respect of the certificates, and what would be received from the processors for the certificates. We agree. The Congressional plan seems to us to be preoccupied with bushels of wheat moving from farm to market, and not with residues after processing. Congress was at the old stand of assuring farm income and, as always, it was concerned with the source of the support payments. It obviously thought to make the processors a revenue source, and the contribution it expected from them was 70¢ per bushel, not 50¢ as it would be under appellants' theory. This is explicit in many exchanges on the floor in both Senate and House;[2] and it is unmistakable from the Senate Com-

[1] The phrases "wheat contained in" and "wheat used in" appear in Section 1379f of the Act; and appellants vigorously maintain that their usage in that context confirms the interpretation claimed for them in § 1379d. Section 1379f is concerned with the establishment of conversion factors. It is said that the Secretary, by working back from the weight of the flour to the weight of the wheat required for its manufacture, has violated the command of Congress to do just the opposite; and that this command itself demonstrates Congress's purpose to require certificates only in respect of the residue of wheat physically present in the flour. To adopt the Secretary's interpretation of "contained in," it is further asserted, would render the Section nonsensical. There is evidence, however, that this statute was enacted against the background of conversion factors devised in accordance with the Secretary's approach; and, in the light of this fact, the phrasing of § 1379f may be reasonably read as the Government contends.

[2] Typical is the following colloquy between the floor manager of the bill, Senator McGovern, and Senator Morton:

"Mr. McGovern. The price of wheat to the miller would tend to be held at approximately $2. It would not change the

(Footnote continued on following page)

mittee report on the 1964 legislation. 1964 U.S. CODE CONG. & AD. NEWS 2142. Characterizing the effect of the proposed legislation as being "to require a certificate on all wheat processed into such (food) products * * *," the Committee also said:

> "Wheat for domestic food use, however, would be priced at about $2, including the value of the certificate. This is the level it has been moving at in recent years and the bill would not result in any increase in the price of wheat to flour millers and should therefor by itself have no effect whatsoever on the price paid for bread by consumers." *Ibid.*

This legislative record, in our view, ineluctably leads to a firm impression that all persons interested in the legislation, including the millers themselves, were under no misapprehension that, if enacted, one buying a bushel of wheat from a farmer to make flour would have to pay 70¢ for a certificate.[8]

(Footnote continued from preceding page)

present price level at all. This bill is designed to prevent the price of wheat from dropping, not to raise it.

Mr. Morton. But if someone wanted to buy 1,000 bushels of wheat, he would have to have 1,000 70-cent certificates.

Mr. McGovern. Yes.

* * *

Mr. Morton. Milling wheat at Chicago today is approximately $2, is it not?

Mr. McGovern. That is approximately right.

Mr. Morton. So after the bill was passed, the purchaser would still have to pay $2 plus the 70-cent certificate?

Mr. McGovern. No. The support rate is set today at different levels than it would be in the absence of this bill. What it will be under the bill if passed is a price of $1.30 plus the 70-cent certificate. Today the total of price support and other assistance comes to $2. So we are not changing the price of wheat 1 cent a bushel under the legislation before us."

110 Cong. Rec. 4169 (1964).

[8] Appellants argue that, even if some ambiguity in the statute be conceded, the result should still be the same inasmuch as the law is clearly a taxing measure and is, therefore, to be construed most strongly against the Government. See *Gould v. Gould*, 245 U.S. 151 (1917). But the purpose of the statute appears to be to regulate the price of wheat for the benefit of the grower, and the

(Footnote continued on following page)

Even without this explicit evidence of Congressional purpose, we would, of course, be slow to reject the Secretary's own reading of a statute which Congress has given him the duty to administer. Administrators are not always right in their divinations of the legislative will, but anyone who is at all familiar with the closeness of the relationship between executive departments and Congress during the consideration by the latter of a change in a major statute administered by the former, knows that their guesses are far from uninformed. In any event, the courts have accorded them a special respect. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385 (1959); *Power Reactor Development Co. v. International Union*, 367 U.S. 396 (1961); and see especially Judge Prettyman's comment on this matter in *California Company v. Udall*, 111 U.S. App. D.C. 262, 266, 296 F. 2d 384, 388 (1961).

III

The regulations issued by the Secretary provided alternative methods for determining the quantity of wheat used in processing. One was on the basis of the weight of the wheat used, and the other by the application of conversion factors to the weight of the resulting food products. In the case of the former, the regulations further provided for a deduction of (1) dockage, (2) shrinkage from drying up to 0.6% and (3) wastage. It is alleged that these allowances account for some—but not all—of the transformation which occurs in a bushel of wheat processed into a food product.

Appellants appear to argue that, even if their reading of the statute be wrong, thereby accepting the propriety of including the bran and germ components in the weight for certificates purposes, the Secretary has acted arbitrarily and capriciously in limiting the deductions for these other elements. This is a point which does not seem to be discussed by the District Court in its memorandum opinion, and which

(Footnote continued from preceding page)
federal power relied upon is the Commerce Clause. The bill was not handled in either chamber as a tax; and the revenue raised is for the achievement of a regulatory purpose and not to contribute to the general funds of the Treasury. Even if considered as a taxing measure, it is unlikely that Congress would fix a 50¢ rate to support a 70¢ outlay.

was urged somewhat obscurely upon us in brief and argument, perhaps because of the overriding importance of the statutory argument. Indeed, the claim of arbitrariness in this regard in reality stems ultimately from appellants' view of the statute, *i.e.*, that only the residue physically present in the finished product may be made the basis of certificate computation.

Taking it, however, as a separate and independent contention, we are not prepared to say that the regulations are invalid. Dockage is a trade term describing impurities. A sample of wheat about to be sold is sieved, and the percentage of dockage in the sample is deducted from the whole. It is not pretended that this test picks up all the foreign matter, but the remaining sample is then graded in a manner which takes this into account. Price goes according to grade. Thus, the regulations allow the usual weight deduction, leaving other impurities to be reflected in price.

Shrinkage from loss of moisture occurs both during storage and in the course of processing. But processing loss is the very nub of the dispute between the parties over the proper reading of the statute; and, once that dispute is resolved in favor of the Secretary, a regulation which makes no allowance for processing loss would be neither arbitrary nor capricious. Appellants, presumably because of their view of the statute, persistently lump the two types of moisture loss together in their argument that the allowance is inadequate, and have made no attempt to differentiate between the two kinds of losses. Thus, the Secretary's contention as to normal shrinkage losses during storage is largely unchallenged, because appellants are proceeding on a different set of assumptions—assumptions which we have rejected in our treatment of the statutory construction argument. In any event, the record does not enable us to say with confidence that the Secretary's allowance by regulation of 0.6 percent for moisture loss is unreasonable.[4]

[4] A Government affidavit asserts that this allowance was fixed upon after consultation with industry spokesmen who advised that it "was adequate to offset any invisible loss occurring during stor-

(Footnote continued on following page)

With respect to wastage, it appears to be undisputed in the record that the regulations do not require marketing certificates in respect of wheat which, because of some flaw in processing, fails to become a food product removed from the plant or marketed as such. And insofar as this claim rests upon the amount of wheat lost in handling and storage, this loss does not appear to be either of such a magnitude or so lacking in relationship to the processing of the wheat as to compel holding the regulations arbitrary.

The judgment of the District Court is

Affirmed.

(Footnote continued from preceding page)
age in the usual course of operations." An affidavit for appellants, although stating that "trade practice recognizes no limit on moisture loss during storage," does not directly challenge the Government's contention that the allowance is based upon *normal* storage conditions.

2. Judgment Below

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1965

No. 19,794

Civil 304-65

THE MORRISON MILLING COMPANY, et al.,
Appellants,
v.
ORVILLE L. FREEMAN, et al.,
Appellees.

United States Court of Appeals for the District of Columbia Circuit
Filed July 18, 1966
Nathan J. Paulson
Clerk

No. 19,795

Civil 352-65

NATIONAL BISCUIT COMPANY and THE QUAKER OATS COMPANY,
Appellants,
v.
ORVILLE L. FREEMAN and COMMODITY CREDIT CORPORATION,
Appellees.

Appeals from the United States District Court for the District of Columbia

Before: Bazelon, Chief Judge, and Danaher and McGowan, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the District Court appealed from in these cases is affirmed.

Per Circuit Judge McGowan.

Dated: July 18, 1966.

Office-Supreme Court, U.S.
FILED
OCT 17 1966
JOHN F. DAVIS, CLERK

SUPREME COURT, U. S.

Nos.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 693

GENERAL MILLS, INC., HARRIS MILLING CO., KELLOGG CO., NATIONAL BISCUIT CO., THE QUAKER OATS CO., BURRUS MILLS, INC., PEAVEY CO., BUHLER MILLS, INC., INTERNATIONAL MILLING CO., THE PILLSBURY CO., NEBRASKA CONSOLIDATED MILLS CO., ARCHER-DANIELS-MIDLAND CO., SHAWNEE MILLING CO., MAUSER MILL CO., THE ABILENE FLOUR MILLS CO., TENNANT & HOYT CO., AND DIXIE-PORTLAND FLOUR MILLS, INC., *Petitioners,*

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION, *Respondents.*

No.

NATIONAL BISCUIT COMPANY AND THE QUAKER OATS COMPANY, *Petitioners,*

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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(CONTINUED FROM FRONT COVER)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

GENERAL MILLS, INC., HARRIS MILLING CO., KELLOGG CO., NATIONAL BISCUIT CO., THE QUAKER OATS CO., BURRUS MILLS, INC., PEAVEY CO., BUHLER MILLS, INC., INTERNATIONAL MILLING CO., THE PILLSBURY CO., NEBRASKA CONSOLIDATED MILLS CO., ARCHER-DANIELS-MIDLAND CO., SHAWNEE MILLING CO., MAUSER MILL CO., THE ABILENE FLOUR MILLS CO., TENNANT & HOYT CO., AND DIXIE-PORTLAND FLOUR MILLS, INC., *Petitioners*,

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION, *Respondents.*

No.

NATIONAL BISCUIT COMPANY AND THE QUAKER OATS COMPANY, *Petitioners*,

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above

two cases on July 18, 1966. The Morrison Milling Company is today filing a petition for certiorari in the first case (the *"Morrison"* case). The certified record filed by petitioner The Morrison Milling Company constitutes the record for both the *Morrison* case and the second case (the *"National Biscuit"* case) as well. For purposes of this petition, the two cases present substantially identical legal issues, as explained *infra* pp. 12-14.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. 1a-9a) is not yet officially reported. The Memorandum Opinion of the United States District Court for the District of Columbia is printed at R. 93-99.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1966 (Appendix A, p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Persons engaged in the processing of wheat into human food products are required, prior to marketing or removing such food product for sale or consumption, to purchase from the Commodity Credit Corporation (the "CCC") "domestic marketing certificates" in an amount "equivalent to the number of bushels of wheat contained in such product." 7 U.S.C. § 1379d (b) (1964).

Regulations issued by the Secretary of Agriculture

[1] "R." refers to the Joint Appendix in the United States Court of Appeals for the District of Columbia Circuit, nine additional copies of which are being filed with this Court by petitioner The Morrison Milling Company.

(the "Secretary"), however, require wheat food processors to acquire such marketing certificates in an amount "equivalent to the number of bushels of wheat used in processing the food products," 7 C.F.R. § 777.11(a), and thus impose marketing certificate liability not only upon the "wheat contained in" food products to be sold and consumed, but also upon foreign substances and unsuitable wheat kernels separated from the usable wheat before processing, moisture which evaporates from the wheat during storage and processing, wheat lost in handling, storage and processing, and approximately 28 per cent of the wheat subjected to the flour milling process, which is removed and separated in the course of milling and disposed of for animal feed, waste or other non-food use.

The question presented is whether the Secretary's regulations are invalid because they are inconsistent with the controlling statute and arbitrary and capricious in that (i) they require processors to acquire marketing certificates for wheat and non-wheat matter not contained in food products, because removed or lost before or during processing, and (ii), even accepting the Secretary's "wheat used in processing" measure of liability, the regulations nevertheless subject processors to liability for wheat and non-wheat matter removed or lost prior to processing.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U.S.C. §§ 1281 *et seq.*, (1964), as amended by the Food and Agriculture Act of 1962, 76 Stat. 605, and as further amended by the Agricultural Act of 1964, 78 Stat. 173, are, first, 7

U.S.C. § 1379d(b) (1964), which provides that as to the 1964 and the 1965 wheat crop marketing years,[2]

> "(i) [A]ll persons engaged in the processing of wheat into food products shall, *prior to marketing any such food product* or removing such food product for sale or consumption, acquire domestic marketing certificates *equivalent to the number of bushels of wheat contained in such product* and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. . . ." (Emphasis supplied.)

The second provision, 7 U.S.C. § 1379f (1964), provides that the marketing-certificate liability of wheat processors is to be based upon "wheat contained in" food products which have been processed and are ready to be sold and consumed:

> "The Secretary shall establish conversion factors which shall be used to determine the amount of *wheat contained in any food product.* The conversion factor for any such food product shall be determined upon the basis of the weight of *wheat used in the manufacture of such product.*" (Emphasis supplied.)

The particular provision of the Secretary's regulations around which this controversy revolves is found in 7 C.F.R. § 777.11(a). It provides that:

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[2] A wheat crop marketing year is, by statute, the period from July 1 of the designated year through June 30 of the ensuing year. 7 U.S.C. § 1301b(7) (1964). This case involves certificate liability imposed for the 1964 and 1965 crop years. Substantially the same program for the 1966 through 1969 crop years was provided for by the Food and Agriculture Act of 1965, 79 Stat. 1187

"Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in § 777.10. The number of certificates acquired by the food processor and surrendered to CCC shall be *equivalent to the number of bushels of wheat used in processing the food products* for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§ 777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation." (Emphasis supplied.)

STATEMENT

This controversy concerns the effort by the Secretary to impose upon wheat processors a measure of "domestic marketing certificate" liability far greater than called for by the governing statute, which imposes certificate liability only for "wheat contained in" food products.

While the controversy is narrow in scope, its understanding will be aided by a general outline of the legislation for the wheat program.

Prior to the 1964 and 1965 wheat crop marketing years, there was no requirement that processors of wheat food products secure certificates or otherwise make payments or meet any other conditions in order to market such products. There had been in effect only a wheat price support program for growers, pursued for many years. This program was administered under the provisions of the Agricultural Act of 1949, 63 Stat. 1051, 7 U.S.C. §§ 1421 *et seq.* (1964).

Under that program, which is still in effect with certain modifications, price support is available only to wheat growers who keep their planted acreage within an allotment determined by the Secretary. Price support is accomplished by so-called CCC loans to such growers, the loans being secured by the grower's wheat. If market prices fall below the "loan rate" used by the Secretary, the grower may "default" on his loan and, if he does so, is relieved of any obligation thereon, except that the CCC acquires title to the wheat by which the loan was "secured."

In the operation of this price support program the CCC had acquired, by 1960, huge stocks of wheat entailing a large investment of government funds and substantial storage charges.[3] Moreover, such wheat often had to be sold by CCC at prices less than the "loans" originally made the the growers.

The net cost of all this had to be met, ultimately, from general appropriations to the CCC—in other words, from the general taxpayer.

Mounting surpluses of wheat in the hands of the CCC gave Congress great concern. This led it to adopt amendments to the wheat subsidy program intended to accomplish—in the main—two things: a reduction in wheat production and a raising of some revenue by the CCC from food processors. This, it was hoped, would result in reducing surpluses and, in addition, would shift from the general taxpayer to food processors a significant portion of the burden of meeting the CCC's costs.

Legislation to that end was first adopted by the Food

[3] As of June 30, 1960, the CCC had on hand 1.195 billion bushels of wheat valued at $2.45 billion. Hearings before the Senate Committee on Appropriations on H.J. Res. 234, 89th Cong., 1st Sess., p. 39 (1965).

and Agriculture Act of 1962. These amendments were to take effect with the 1964 wheat crop marketing year. But its effectiveness was made contingent upon approval by a two-thirds majority in a wheat growers' referendum. Such a referendum was held in May 1963 and the program failed of adoption.

Thereafter Congress considered the problem further and ultimately additional amendments were enacted in the Agricultural Act of 1964. That legislation eliminated the required referendum approval of the program provided for in the 1962 law and made certain other amendments in the 1962 provisions.

The law, as amended by the Agricultural Act of 1964, laid down the following program for the 1964 and 1965 wheat crop marketing years.

Price support continued, generally speaking as in the past, but with the very important difference that the "loan rates" were set by the Secretary at a much lower level. The allotment for each farm—the number of acres planted to wheat—was reduced. This, it was hoped, would ultimately lead to a reduction of wheat surpluses. A wheat grower who agreed to stay within this reduced allotment was eligible for price support. And, if he further agreed to devote the acreage by which he has reduced his wheat planting to certain conservation uses specified by the Secretary, he was eligible for an additional benefit in the form of a certificate for each bushel of a portion of the grower's estimated crop from the acreage he was to plant. That portion was determined by the Secretary for each crop marketing year; for the 1964 year he determined that it should be 90 per cent of the estimated crop.

These certificates entitled the grower to payment of a cash benefit from the CCC. The amount of the bene-

fit per certificate was determined by the Secretary. The aim was to provide the grower, from the reduced level of price support plus the cash payment pursuant to the certificates, with a total amount that would achieve the Congressional objective as to a grower's income.

The certificates for such a grower were determined by an advance estimate based on the grower's normal rate of yield from his planted acreage; the estimate was made long prior to harvest. An unusually high actual yield would not increase the certificates for the grower. But by the same token an unusually low yield —or even no yield at all—due to drought or other hazard would not reduce the certificates for the grower.

Thus, for the grower who agreed to the restricted acreage and diversion to conservation uses, the certificates not only produced cash benefits that provided income in addition to that provided by the new (and lower) price support level but also furnished, in effect, a substantial measure of wheat crop insurance.

The certificates issued to such growers were of two sorts, domestic certificates and export certificates. A different monetary benefit was fixed for each type by the Secretary, and a new determination of the amount of that benefit was made by the Secretary for each crop marketing year. For 1964 the Secretary fixed 70 cents for the domestic certificate and 25 cents for the export certificate. The Secretary prescribed what proportion of a grower's certificates were to be export certificates; the upper limit of this proportion reflected the portion of the nation's total wheat crop that was likely to be exported, but the Secretary had wide discretion to vary the proportion.

In most instances the growers simply received a check from the CCC for the amount of the certificate payment, the "issuance" of certificates being a fiction.

While in detail the Act's provisions as to growers are extremely complicated, the basic pattern is fairly simple. The Secretary provides for price support to eligible growers at a considerably lower level than under previous programs as he deems appropriate; but for those growers who will voluntarily agree to a prescribed diversion of acreage to certain conservation uses he is empowered, through the largely (if not entirely) fictional certificate device and through complicated calculations based on advance estimates, to provide an additional benefit or subsidy which both enhances such growers' income and insures them, in a substantial measure, against the hazards of wheat agriculture.

None of this portion of the wheat program is questioned in any way in, or affected by the outcome of, this case.

The element of the Act that is involved here is the Act's provision for raising revenue for the CCC. That is the provision of 7 U.S.C. § 1379d(b) (1964), quoted *supra* p. 4. It requires processors of wheat food products, prior to removal of any such food product for sale or consumption or prior to its marketing, to acquire, and pay for, domestic marketing certificates for the "wheat contained in such product."

The fact that the price of a processor's certificate is the same in amount as the benefit fixed by the Secretary for the domestic certificate "issued" to a grower led the courts below to assume that there was some sort of equivalence between the number of "certificates"

issued to growers and the number of "certificates" required to be purchased by processors. The fact is that there is no such equivalence:

(1) The processor pays even if his wheat originated with a grower who did not participate in the program and therefore never had any certificate payments at all (which for the 1964 crop year amounted to some 25 per cent of all the wheat production).

(2) The processor pays even if his wheat originated from that portion of the participating grower's crop that exceeded normal yield, for which no certificate payments were made to the grower.

(3) The processor pays even if his wheat originated from that portion of a participating grower's crop that was not "certified."

(4) The processor pays even if his wheat originated from that portion of a participating grower's crop that was estimated to be for export.

(5) The processor pays even if he got his wheat from an importer from outside the United States.

Thus it is absolutely impossible under the framework of the Act for there to be any equivalence, theoretical or real, between the domestic certificates "issued" to participating growers and the certificates "bought" by food processors.

It is also to be noted that the Act does not purport to limit the financing of the CCC's wheat activities to the revenue it derives from the food processors. The levy on processors is simply a device to provide the CCC with some revenues other than appropriations from general tax funds and so to lessen the extent to which the general taxpayer will carry the burden. But neither the express terms of the Act nor anything in

its pattern suggests any particular relationship between the amounts thus to be levied on processors and the amounts to be provided from the general taxpayer.

It is under this asserted but nonexistent equivalence that the Secretary supported his transmutation of the statutory measure of processor certificate liability—"wheat contained in" food products—to the measure of certificate liability imposed by his regulations—"wheat used in processing food products." To do this the Secretary had to torture the English language so as to conclude that the following matter is "wheat contained in" a food product:

(1) Foreign substances (*e.g.*, rocks, sticks, metal scraps, etc.) and unsuitable wheat (*e.g.*, damaged and shriveled kernels) mingled with the raw matter acquired, but separated from the usable wheat before processing (R. 18-23);[4]

(2) Moisture contained in the wheat when acquired, but lost by evaporation both during storage and in processing (R. 18-25);[5]

(3) Wheat that is spilled or that clings to bins or is otherwise lost in storage, in handling or in processing (R. 22-24); and

(4) Non-food products produced during processing and disposed of for animal feed or other non-food use, and thus not part of or "contained in" the finished food products resulting from the processing (R. 23-25).

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[4] The Secretary allowed processors to exclude a limited amount of this matter from certificate liability by allowing the deduction of "dockage." It was uncontroverted that "dockage" does not take into account anything approaching all of this matter (R. 20).

[5] The Secretary allowed processors to make a limited allowance for moisture loss, but it was uncontroverted that moisture loss for particular cases would exceed his allowance (R. 22).

It is plain that none of these items are contained in the food products marketed and sold by processors.

It is equally plain that all the materials in item (1) above, and those parts of items (2) and (3) that are lost prior to processing, are not even "wheat used in processing food products." In requiring that certificates be bought on account of these materials, the Secretary goes even beyond his own regulatory declaration that certificate liability is to be measured by the weight of "wheat used in processing food products."

The *Morrison* case was initially filed by six wheat processors individually and as a class action on behalf of the some 500 companies in the wheat processing industry in the United States, seeking a declaration that the regulations were invalid (i) because they were inconsistent with the controlling statutory provisions, including 7 U.S.C. § 1379d(b) and § 1379f; and (ii) because they were arbitrary, discriminatory and without rational basis (R. 5-11).

Jurisdiction of the United States District Court was invoked because the cause of action arises under a law relating to commerce (the Agricultural Adjustment Act of 1938, as amended in 1962 and 1964), involves an amount in controversy in excess of $10,000 (28 U.S.C. §§ 1331, 1337), is against the CCC (15 U.S.C. § 714b) and seeks judicial review of final agency action for which there is no other adequate remedy (5 U.S.C. § 1009). Additional processors subsequently requested, and were granted, leave to intervene (R. 81-92).

The companion *National Biscuit* case was likewise filed individually and as a class action. Jurisdiction was invoked on the same grounds as in the *Morrison* case (R. 104-05).

The cases came together before the District Court on cross motions for summary judgment (R. 14, 36). The District Court upheld the validity of the regulations (R. 93-99), and the Court of Appeals affirmed (Appendix A, pp. 1a-9a).

National Biscuit, like *Morrison*, arose out of the administration of the wheat program enacted by the Agricultural Act of 1964. The Act provided (7 U.S.C. § 1379g (1964)), that the Secretary might take action to facilitate the transition between the pre-1964 support program and the program introduced by the Act. The petitioners in *National Biscuit* are two wheat processors that had an inventory on July 1, 1964, the effective date of the new program, of wheat acquired prior to that time ("old crop wheat"), which they processed into food products after that date.

The processors of such wheat were required under the Secretary's regulations, purportedly made pursuant to the Act, to purchase "transition certificates" as they processed old-crop wheat. These were similar to the domestic processing certificates required to be purchased on wheat acquired after July 1, 1964 ("new crop wheat"), but the price of the transition certificates was quite different. The object of the "transition" provision of the statute was to correlate the price of food products made from old crop wheat, originally purchased under a different type of support program, with that of food products made from new crop wheat that would be sold in competition with them.

Count II of the Complaint in *National Biscuit* disputed the manner in which the price of the transition certificates was computed, and therefore raised issues not present in the *Morrison* case. The decision of the District Court as to Count II, however, was not con-

tested on appeal, and these issues are therefore not before the Court.

The remaining issues, those presented by Count I of the Complaint and preserved on appeal, are identical with those involved in *Morrison*. For as to the transition certificates, just as to certificates levied on processors on account of wheat from the 1964 and subsequent crops, the statute provides (7 U.S.C. § 1379d(b) (1964)) that such certificates shall be imposed on "the number of bushels of wheat contained in" food products. Just as he has in the case of new-crop wheat, the Secretary through his regulations has transformed "wheat contained in" food products into "wheat used in processing." He has, further, construed "wheat used in processing" to include (1) moisture lost by evaporation during storage and in processing, (2) the amount of wheat spoiled or otherwise lost in storage, handling or processing, and (3) wheat used for non-food products, primarily animal feed.

The sole difference between these two companion cases as they appear before the Court is that with respect to new-crop wheat, but not with respect to old-crop wheat, the Secretary imposed certificate liability on non-wheat substances, such as rocks, dirt and so on, unsuitable for processing and separated from the wheat prior to processing. While the Secretary's regulations purported to impose certificate liability for these materials on processors of old-crop wheat as well, the CCC in administering the program did not impose such liability on purchasers of transition certificates (R. 107).

REASONS FOR GRANTING THE WRIT

I

This is a case of first impression under the Agricultural Adjustment Act of 1938, as amended by the Agricultural Act of 1964. While the Act was operative only as to the 1964 and 1965 wheat crop marketing years, its subsequent amendment by the Food and Agriculture Act of 1965 has extended processor domestic marketing certificate liability, in the same statutory terms, through the 1969 crop year. 79 Stat. 1187 (1965).

Petitioner The Morrison Milling Company, in its separate petition, has ably advanced the reasons for granting a writ of certiorari.

It should be emphasized that this case involves, purely and simply, an excise tax. The tax is levied, in the words of the applicable statute, on "wheat contained in" food products. Congress chose not to impose this tax through inclusion in the Internal Revenue Code. Rather, it erected an elaborate superstructure of required "domestic marketing certificates" which a wheat processor must obtain before he may legally market his wheat food products. The record shows that marketing certificates are creatures of fiction; the processor simply pays a monthly sum to the CCC; the sum is computed under regulations promulgated by the Secretary (R. 27).

At issue in this case is whether the petitioners are to be accorded the basic protection of taxpayers—the protection of being able to look to the terms of the statute to determine the basis on which the tax will be levied—or whether the plain statutory language may be distorted by the Secretary.

For it cannot be disputed that he has distorted the

statutory measure of liability. He has substituted for the statutory phrase "wheat contained in" food products the administrative phrase "wheat used in processing food products." We have explained above (*supra* pp. 11-12) the matter which the Secretary includes in his measure of liability, which goes even beyond his own standard of "wheat used in processing food products." The inclusion of such matter results in the imposition of substantial additional liability on the petitioners.

It is plain that if an excise on "wheat contained in" food products were included in the Internal Revenue Code, the petitioners' position would prevail. The rule is clear that the subject of a tax must be specified with certainty. *United States* v. *Community TV, Inc.*, 327 F.2d 797, 800 (10th Cir. 1964). And it is one of the "settled rules of statutory construction . . . that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938). To the same effect is *Gould* v. *Gould*, 245 U.S. 151, 153 (1917).

In order to avoid this well-established rule of statutory construction, the Court of Appeals was forced to accept the Secretary's argument that form prevails over substance in determining whether the statute is to be considered a taxing measure. Here is what the Court of Appeals said:

> "[T]he purpose of the statute appears to be to regulate the price of wheat for the benefit of the grower, and the federal power relied upon is the Commerce Clause. The bill was not handled in either chamber as a tax; and the revenue raised is for the achievement of a regulatory purpose and not to contribute to the general funds of the

Treasury. Even if considered as a taxing measure, it is unlikely that Congress would fix a 50¢ rate to support a 70¢ outlay." Appendix A, p. 7a, n.3.

The court's reasoning simply will not bear analysis. First, the assertion that the purpose of the statute is to regulate and not to tax overlooks the fact that the statute serves two purposes. It is no less a taxing measure because in other sections it regulates wheat growers. The impact of the domestic certificate levy on the processor and the consequences to the Treasury are not one whit different from what they would be had the certificate levy been denominated an excise tax. The fact that the receipts from the certificate collections of the CCC do not go into general Treasury funds makes no difference. It is clear that the processor certificate tax was proposed to supplant the burden on general revenues caused by prior wheat programs. See p. 6, *supra*.

Principles of statutory interpretation should not turn on so capricious a consideration as the use of the word "certificate" instead of "tax."[6] The criteria applied to the interpretation of tax statutes are applied to tariff laws even though their primary purpose is

[6] The reason why Congress chose to levy on wheat processors through the required acquisition of fictional marketing certificates, rather than through an excise tax denominated as such, is not hard to discover. In 1933 Congress passed the Agricultural Adjustment Act of 1933, providing in part for the levy of a so-called processing tax, 48 Stat. 35 (1933), 7 U.S.C. § 609 (1964). The tax was levied on the processing of specified agricultural commodities, including wheat. That tax was struck down as unconstitutional in United States v. Butler, 297 U.S. 1 (1936). It was at least partly the question of the continuing validity of the *Butler* case that led Congress, when next it chose to raise government funds through a special levy on processors, to avoid the language of taxation. Cf. Hearings Before the Subcommittee on Wheat of the House Committee on Agriculture, ser. HH., pt. 2, p. 204 (1964). An ingenious substitute—the marketing certificate requirement—was developed.

to protect domestic industry rather than to raise revenue. See, *e.g., Erskine* v. *United States,* 84 F.2d 690, 691 (9th Cir. 1936); *Dessy Enterprises* v. *United States,* 162 F. Supp. 947, 951 (Cus. Ct. 1958); *Walling* v. *Cohen,* 140 F.2d 453, 456-57 (3d Cir. 1944). *A fortiori* such principles should govern interpretation of the provision for the certificate levy. For the so-called domestic certificate "sold" by CCC to the processor regulates nothing. It merely raises revenue.

Nor does the fact that the bill was handled in Congress by the committees concerned with agriculture make the certificate levy any less a tax. That the levy was, in practical effect, an excise tax was readily apparent to Congress; indeed for that very reason the House of Representatives seriously considered whether its rules required that the measure be referred to its Ways and Means Committee, in addition to its Agriculture Committee. 110 Cong. Rec. 7309 ff. (April 8, 1964).

Virtually explicitly, moreover, the Senate Agriculture Committee in 1964 recognized that the domestic certificate levy on processors was indeed a revenue measure. In 1964 the very section imposing the certificate levy was amended to provided that, in the case of *exports* of wheat and wheat flour, the CCC could *refund* part or all the export certificate levy. This amendment was explained by the Committee as follows: "Since the purpose of requiring certificates on wheat and wheat products *exported* is *not to obtain revenue,* but solely to regulate the price at which such products are *exported* and eliminate the possibility of windfall profits," refunds were provided for. Sen. Rep. No. 874, 88th Cong., 2d Sess., p. 33 (1964). (Emphasis supplied.) There could hardly be a clearer recognition

that the purpose of requiring certificates on *non-exported* wheat was "to obtain revenue." Indeed such a requirement could not possibly have any other purpose.

Finally, the Court of Appeals said that "it is unlikely that Congress would fix a 50¢ rate to support a 70¢ outlay." If by that the court meant to imply that the measure of processor certificate liability adopted by the Secretary results in some equivalence between domestic marketing certificate collections from processors and payouts to growers, the court was mistaken. For the measure of liability adopted by the Secretary resulted in a CCC estimate that its profits under the domestic certificate program would be approximately $75 million for the 1964 crop year alone. *Hearings on H. J. Res. 234 Before the Senate Committee on Appropriations,* 89th Cong., 1st Sess., p. 29 (1965). As noted *supra,* pp. 9-10, the statutory framework provides absolutely no equivalence between "certificate" collections from processors and "certificate" payouts to growers. The excessive measure of liability imposed by the Secretary, and the resulting enormous profits to the Government, show that even if it were assumed that Congress did intend some sort of equivalence, the petitioners' position should nonetheless prevail.

II

In a sense, one's first encounter with these cases is bound to be misleading. The complexity of the factual and regulatory background that must be mastered before the issue appears in its full simplicity tends to obscure the fact that this issue is really very simple indeed. It is whether the phrase "wheat contained in" fully processed human food products, when used in a

statute, can be expanded by administrative fiat to include not only such wheat, but also (1) foreign substances such as rocks, sticks, dirt and rodent excrement, mixed in with the wheat when purchased by the processor but separated therefrom by him before the wheat is processed into food products; (2) moisture lost by evaporation during storage and processing; (3) wheat that is spoiled or otherwise wasted in handling, storage or processing, and is thus not contained in the processed food products; and (4) by-products other than human food.

Petitioners contend that if these are "wheat contained in" processed human food products, then the English language has lost its meaning. If there was ever a case suitable for application of the rule that when words have a plain and ordinary meaning that would be universally understood and agreed upon by ordinary people, that meaning governs the interpretation of those words in a statute, that case is this one.

This is really all there is to it. But the respondents, in purporting to apply and administer the statute, have introduced, and persuaded the court below to accept, endless complexities and ramifications in an attempt to obscure the issue and to justify their course of conduct.

Consider only the bare essentials of what the respondents have done.

First, they have said, and promulgated in regulations, that "wheat contained in" food products really means, not what it says, but rather "wheat used in processing the food products." The statutory term plainly means nothing of the kind. "Wheat contained in" food products means the wheat that is present when processing has been completed. "Wheat used in processing" means, on the other hand, the wheat present at

the outset of processing. Since there is much less wheat present at the latter stage than at the earlier stage, which term is used makes quite a difference.

But "wheat used in processing" has at least this in common with "wheat contained in" food products: both are wheat. In their second step, respondents discarded this final link with the statute by announcing that "wheat used in processing" includes rocks, dirt, rodent excrement and other like substances that happen to be mixed in with the wheat when acquired by the processor. Neither are these substances wheat nor are they used in processing. They are carefully separated out from the wheat before the processing begins. Still, less, of course, are they "wheat contained in" human food products.

At the end of this second step, however, the respondents found that they had done too much. They had decided to allow the processors to deduct from the weight on which certificate liability was to be assessed some, but not all, of the rocks, dirt and so on that by the first two steps had been brought within the statutory definition. They therefore allowed the processors to deduct percentage allowances that included some, but not all, of the foreign substances and other improper additions to the "wheat contained in" food products.

Thus the respondents' final position, under which they have administered and are administering the statute, is that, for example, of two rocks present along with wheat as bought by the processor, and separated out by the same operation and at the same time prior to processing, one rock is both "wheat contained in" food products and "wheat used in processing," but the other rock is neither. Respondents have yet to suggest any conceivable theory on which this arbitrary distinction can be justified in terms of the statute.

The real significance of this third step, it is submitted, is to show that respondents had a justifiable skepticism about the validity, let alone the fairness, of their first two steps. None of the three, we submit, has the slightest warrant in the governing statute.

Fourthly and finally, when confronted with another provision of the same Act that demonstrates beyond peradventure that all their first three steps were wrong, respondents simply turned that section upside down and applied it as though it meant the opposite of what it says. The section in question, 7 U.S.C. § 1379f, reads as follows:

> "The Secretary shall establish conversion factors which shall be used to determine the *amount of wheat contained in any food product.* The conversion factor for any such food product shall be determined upon the basis of the *weight of wheat used in the manufacture of such product.*" (Emphasis supplied.)

The respondents have administered this section as though it read:

> "The Secretary shall establish conversion factors which shall be used to determine the *amount of wheat used in the manufacture of any food product.* The conversion factor for any such food product shall be determined upon the basis of the *weight of wheat contained in such food product.*"

It is respectfully suggested that any pattern of statutory construction and administration that involves the four steps outlined above must be wrong.

CONCLUSION

The writ of certiorari should be issued.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,794

THE MORRISON MILLING COMPANY, et al., *Appellants*,

v.

ORVILLE L. FREEMAN, et al., *Appellees*

No. 19,795

NATIONAL BISCUIT COMPANY, and
THE QUAKER OATS COMPANY, *Appellants*,

v.

ORVILLE L. FREEMAN and
COMMODITY CREDIT CORPORATION, *Appellees*

Appeals from the United States District Court for the District of Columbia

Decided July 18, 1966

Before BAZELON, *Chief Judge*, DANAHER and MCGOWAN, *Circuit Judges*.

MCGOWAN, *Circuit Judge*: These appeals from the District Court involve an attack by a number of wheat processors upon regulations issued and observed by the Secretary of Agriculture under the Agricultural Act of 1964. 78 Stat. 177, as amended, 7 U.S.C. §§ 1301 *et seq.* The regulations are asserted to be in direct conflict with the statute and, in any event, arbitrary and capricious. These claims were unavailing in the District Court which, on cross-

motions for summary judgment, granted that relief to appellees. The issues raised before us relate solely to the merits; and, for the reasons appearing hereinafter, we affirm the District Court.

I

The controversy is a consequence of a change by Congress in the method of providing financial support for the American wheat grower. Immediately prior to July 1, 1964—the effective date of the statute here in issue—the grower could count on $2.00 per bushel. This was available in the form of (1) a price support loan of $1.82 and (2) a Commodity Credit Corporation payment of 18¢. Under the new scheme, the loan level was reduced to $1.30, and a system of marketing certificates was set up. That scheme provided for an estimate by the Secretary of the national marketing quota of wheat. This included, among other things, estimates of the amount needed in the manufacture of food products for human consumption in the United States and of the amount to be exported. When the market quota was determined, the Secretary estimated the acreage required to produce it. Certificates of two kinds—domestic and export—were then issued to growers, who met the acreage allotment regulations, for that per cent of their estimated crop which corresponded with the percentages derived from the Secretary's estimates of domestic consumption and export needs. A 70¢ certificate was issued for each bushel of wheat within the grower's allocation for domestic consumption, and a 25¢ certificate for each bushel within the allocation for exporting. The cash to redeem the domestic certificates was to come in the first instance from the processor.

The critical language of the statute which controls the liability of processors for the certificates is the following, 7 U.S.C. §1379d:

> (b) During any marketing year for which a wheat marketing allocation program is in effect, (i) all persons engaged in the processing of wheat into food products shall, prior to marketing any such food product or removing such food product for sale or consumption, acquire domestic marketing certificates *equivalent to*

the number of bushels of wheat contained in such product and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. (Emphasis supplied)

Under an express grant elsewhere in the Act, § 1379j, to prescribe "regulations governing the acquisition, disposition or handling of marketing certificates," the Secretary issued this regulation, 7 C.F.R. § 777.11 (1965):

Time and manner of acquiring and surrendering certificates.

(a) *General.* Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in § 777.10. The number of certificates acquired by the food processor and surrendered to CCC shall be *equivalent to the number of bushels of wheat used in processing the food products* for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§ 777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation. (Emphasis supplied).

It is the juxtaposition of the underlined words in statute and regulation which frames the principal problem presented in this litigation. Appellants urge that the number of bushels of wheat "contained" in a sack of white flour is not the same as the number of bushels "used" in making it. This results primarily from the fact that roughly 18 percent of the components of a kernel of wheat are made up of so-called bran and germ which go into by-products such as animal feeds. There is the further circumstance that a bushel of wheat as delivered to the miller customarily contains impurities and defective kernels which must be screened out, and moisture which is lost both while awaiting processing and in the course of processing itself.

Appellants attack the formula established by the Secretary for computing the amount of wheat for which the processors must buy certificates. The argument to us is, first, that the statute admits of nothing other than the requirement that the processor buy only as many certificates as there are bushels of wheat physically incorporated in the finished flour; and, second, that, even if bran and germ be not eliminated from this computation, the regulations have unreasonably and arbitrarily limited the permissible deduction for impurities and shrinkage. We deal with these issues in turn.

II

Appellants insist that the statutory language is so clear as to bar resort to external aids to interpretation. See *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269 (1929), and our own statement of this proposition in *Elm City Broadcasting Corp.* v. *United States*, 98 U.S.App.D.C. 314, 319, 235 F. 2d 811, 816 (1956). But this is a doctrine which reflects a highly optimistic view of the human capacity to communicate precise meaning by the written word. There are surely occasions where its invocation is justified, particularly where a covert look may indicate that the appeal from one set of words to another is not very illuminating. It is rare indeed, however, that particular words patently preclude all but one meaning; and courts should be slow to spurn such enlightenment as may be available from any authentic source.

We do not believe that the statutory reference to bushels of wheat "contained in" flour in this context is as clear in its signification as appellants assert. It is not wholly idle to believe that perhaps Congress might have been thinking in terms of bushels of wheat "used in" making flour, as the regulation assumes. It would not be a bizarre employment of ordinary speech for a housewife to say that three quarts of cherries were "contained in" her jam, although, when cross-examined about the stems and the pits and so on, she might readily agree that she had in reality "used in" making the jam three quarts of cherries. We think that, contrary to appellants' claim, an ambiguity lurks in this statute

which authorizes us to look beyond its four corners for help in resolving this substantial dispute about its meaning.

Our first look, however, is not outside the Act of which Section 1379d(b) is a part. Domestic marketing certificates are provided for in Section 1379c. The Secretary is directed to arrange "for the issuance of domestic marketing certificates for the portion of wheat marketing allocation representing wheat *used* for food products . . ." (Emphasis supplied). The Secretary is also directed to fix as the value of domestic marketing certificates, the difference between the support level of certificate wheat and the support level of non-certificate wheat. These respective levels as set by the Secretary were $2.00 and $1.30, respectively, leaving the value of a certificate, as defined in the statute, at 70¢.[1]

The scheme of the statute is that the Secretary was to estimate in advance how many bushels of the annual crop would go into domestic processing. A certificate was to be issued in respect of each bushel in this estimate. A processor must acquire a certificate for each bushel bought by him for processing. The producer of that bushel was paid 70¢ by the Government. If the Government was not to be out of pocket, the processor must pay 70¢ for the certificate.

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[1] The phrases "wheat contained in" and "wheat used in" appear in Section 1379f of the Act; and appellants vigorously maintain that their usage in that context confirms the interpretation claimed for them in §1379d. Section 1379f is concerned with the establishment of conversion factors. It is said that the Secretary, by working back from the weight of the flour to the weight of the wheat required for its manufacture, has violated the command of Congress to do just the opposite; and that this command itself demonstrates Congress's purpose to require certificates only in respect of the residue of wheat physically present in the flour. To adopt the Secretary's interpretation of "contained in," it is further asserted, would render the Section nonsensical. There is evidence, however, that this statute was enacted against the background of conversion factors devised in accordance with the Secretary's approach; and, in the light of this fact, the phrasing of § 1379f may be reasonably read as the Government contends.

The District Court was of the view that Congress had been thinking in terms of a rough equivalence between what had to be paid out to the farmers in respect of the certificates, and what would be received from the processors for the certificates. We agree. The Congressional plan seems to us to be preoccupied with bushels of wheat moving from farm to market, and not with residues after processing. Congress was at the old stand of assuring farm income and, as always, it was concerned with the source of the support payments. It obviously thought to make the processors a revenue source, and the contribution it expected from them was 70¢ per bushel, not 50¢ as it would be under appellants' theory. This is explicit in many exchanges on the floor in both Senate and House;[2] and it is unmistakable from the Senate Committee report on the 1964 legislation. 1964 U.S. CODE CONG. & AD. NEWS 2142. Characterizing the effect of the proposed legislation as being "to require a certificate

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[2] Typical is the following colloquy between the floor manager of the bill, Senator McGovern, and Senator Morton:

"MR. MCGOVERN. The price of wheat to the miller would tend to be held at approximately $2. It would not change the present price level at all. This bill is designed to prevent the price of wheat from dropping, not to raise it.

MR. MORTON. But if someone wanted to buy 1,000 bushels of wheat, he would have to have 1,000 70-cent certificates.

MR. MCGOVERN. Yes.

* * *

MR. MORTON. Milling wheat at Chicago today is approximately $2, is it not?

MR. MCGOVERN. That is approximately right.

MR. MORTON. So after the bill was passed, the purchaser would still have to pay $2 plus the 70-cent certificate?

MR. MCGOVERN. No. The support rate is set today at different levels than it would be in the absence of this bill. What it will be under the bill if passed is a price of $1.30 plus the 70-cent certificate. Today the total of price support and other assistance comes to $2. So we are not changing the price of wheat 1 cent a bushel under the legislation before us."

110 CONG. REC. 4169 (1964).

on all wheat processed into such (food) products . . .," the Committee also said:

> "Wheat for domestic food use, however, would be priced at about $2, including the value of the certificate. This is the level it has been moving at in recent years and the bill would not result in any increase in the price of wheat to flour millers and should therefore by itself have no effect whatsoever on the price paid for bread by consumers." *Ibid.*

This legislative record, in our view, ineluctably leads to a firm impression that all persons interested in the legislation, including the millers themselves, were under no misapprehension that, if enacted, one buying a bushel of wheat from a farmer to make flour would have to pay 70¢ for a certificate.[3]

Even without this explicit evidence of Congressional purpose, we would, of course, be slow to reject the Secretary's own reading of a statute which Congress has given him the duty to administer. Administrators are not always right in their divinations of the legislative will, but anyone who is at all familiar with the closeness of the relationship between executive departments and Congress during the consideration by the latter of a change in a major statute administered by the former, knows that their guesses are far from uninformed. In any event, the courts have accorded them a special respect. *FTC* v. *Mandel Brothers,*

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[3] Appellants argue that, even if some ambiguity in the statute be conceded, the result should still be the same inasmuch as the law is clearly a taxing measure and is, therefore, to be construed most strongly against the Government. See *Gould* v. *Gould*, 245 U.S. 151 (1917). But the purpose of the statute appears to be to regulate the price of wheat for the benefit of the grower, and the federal power relied upon is the Commerce Clause. The bill was not handled in either chamber as a tax; and the revenue raised is for the achievement of a regulatory purpose and not to contribute to the general funds of the Treasury. Even if considered as a taxing measure, it is unlikely that Congress would fix a 50¢ rate to support a 70¢ outlay.

Inc., 359 U.S. 385 (1959); *Power Reactor Development Co.* v. *International Union*, 367 U.S. 396 (1961); and see especially Judge Prettyman's comment on this matter in *California Company* v. *Udall*, 111 U.S.App.D.C. 262, 266, 296 F. 2d 384, 388 (1961).

III

The regulations issued by the Secretary provided alternative methods for determining the quantity of wheat used in processing. One was on the basis of the weight of the wheat used, and the other by the application of conversion factors to the weight of the resulting food products. In the case of the former, the regulations further provided for a deduction of (1) dockage, (2) shrinkage from drying up to 0.6% and (3) wastage. It is alleged that these allowances account for some—but not all—of the transformation which occurs in a bushel of wheat processed into a food product.

Appellants appear to argue that, even if their reading of the statute be wrong, thereby accepting the propriety of including the bran and germ components in the weight for certificate purposes, the Secretary has acted arbitrarily and capriciously in limiting the deductions for these other elements. This is a point which does not seem to be discussed by the District Court in its memorandum opinion, and which was urged somewhat obscurely upon us in brief and argument, perhaps because of the overriding importance of the statutory argument. Indeed, the claim of arbitrariness in this regard in reality stems ultimately from appellants' view of the statute, *i.e.*, that only the residue physically present in the finished product may be made the basis of certificate computation.

Taking it, however, as a separate and independent contention, we are not prepared to say that the regulations are invalid. Dockage is a trade term describing impurities. A sample of wheat about to be sold is sieved, and the percentage of dockage in the sample is deducted from the whole. It is not pretended that this test picks up all the foreign matter, but the remaining sample is then graded in a manner which takes this into account. Price goes according to grade. Thus, the regulations allow the usual weight deduction, leaving other impurities to be reflected in price.

Shrinkage from loss of moisture occurs both during storage and in the course of processing. But processing loss is the very nub of the dispute between the parties over the proper reading of the statute; and, once that dispute is resolved in favor of the Secretary, a regulation which makes no allowance for processing loss would be neither arbitrary nor capricious. Appellants, presumably because of their view of the statute, persistently lump the two types of moisture loss together in their argument that the allowance is inadequate, and have made no attempt to differentiate between the two kinds of losses. Thus, the Secretary's contention as to normal shrinkage losses during storage is largely unchallenged, because appellants are proceeding on a different set of assumptions—assumptions which we have rejected in our treatment of the statutory construction argument. In any event, the record does not enable us to say with confidence that the Secretary's allowance by regulation of 0.6 percent for moisture loss is unreasonable.[4]

With respect to wastage, it appears to be undisputed in the record that the regulations do not require marketing certificates in respect of wheat which, because of some flaw in processing, fails to become a food product removed from the plant or marketed as such. And insofar as this claim rests upon the amount of wheat lost in handling and storage, this loss does not appear to be either of such a magnitude or so lacking in relationship to the processing of the wheat as to compel holding the regulations arbitrary.

The judgment of the District Court is

Affirmed.

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[4] A Government affidavit asserts that this allowance was fixed upon after consultation with industry spokesmen who advised that it "was adequate to offset any invisible loss occurring during storage in the usual course of operations." An affidavit for appellants, although stating that "trade practice recognizes no limit on moisture loss during storage," does not directly challenge the Government's contention that the allowance is based upon *normal* storage conditions.

Filed July 18, 1966, /s/ Nathan J. Paulson, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965.

[Civil 304-65, 352-65]

No. 19,794

THE MORRISON MILLING COMPANY, ET AL., *Appellants*,

v.

ORVILLE L. FREEMAN, ET AL., *Appellees*.

No. 19,795

NATIONAL BISCUIT COMPANY AND THE QUAKER OATS COMPANY, *Appellants*,

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION, *Appellees*.

Appeals from the United States District Court for the District of Columbia.

Before: BAZELON, Chief Judge, and DANAHER and McGOWAN, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is affirmed.

Per Circuit Judge McGOWAN.

Dated: July 18, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 692

THE MORRISON MILLING COMPANY, PETITIONER

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION

No. 693

GENERAL MILLS, INC., ET AL., PETITIONERS

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R. 93–99)[1] is

[1] "R." refers to the Joint Appendix in the court of appeals, nine copies of which petitioner The Morrison Milling Company has filed in this Court. "Pet. App." refers to the appendix to the petition for a writ of certiorari of The Morrison Milling Company.

unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B1–10) is reported at 365 F. 2d 525.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1966. The petitions for writs of certiorari were filed on October 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture's regulation (7 C.F.R. 777.11(a)) requiring wheat processors to purchase domestic marketing certificates equivalent to the number of bushels of wheat used in processing flour and other food products is inconsistent with the governing statute (7 U.S.C. 1379d(b)).

2. Whether the Secretary's regulations (7 C.F.R. 777, Appendix II) limiting the deductions from the gross weight of wheat, upon which processors are required to purchase certificates, are arbitrary, discriminatory and without rational basis.

STATUTE AND REGULATIONS INVOLVED

The statute to be construed is the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended by the Food and Agriculture Act of 1962, 76 Stat. 605, and the Agricultural Act of 1964, 78 Stat. 173, 7 U.S.C. 1281 *et seq.* The Secretary's Processor Wheat Marketing Certificate Regulations are found in 7 C.F.R. Part 777 (1966).

The statute provides, in pertinent part, as follows:

§ 1379d. ***Marketing restrictions.***

* * * * *

(b) *Processor and exporter acquisition of domestic and export certificates; international trade; expansion; refunds or credits for certificates; exemptions from requirements.*

During any marketing year for which a wheat marketing allocation program is in effect, (i) *all persons engaged in the processing of wheat into food products shall,* prior to marketing any such food product or removing such food product for sale or consumption, *acquire domestic marketing certificates equivalent to the number of bushels of wheat contained in such product* and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. * * * [Emphasis supplied.]

* * * * *

§ 1379j. *Regulations.*

The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of sections 1379a–1379j of this title including but not limited to regulations governing the acquisition, disposition, or handling of marketing certificates.

The Secretary's regulation (7 C.F.R. 777.11) provides, in pertinent part, as follows:

§777.11 *Time and manner of acquiring and surrendering certificates.*

(a) *General.* Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in § 777.10. The number of certificates acquired by the food processor and surrendered to CCC shall be

equivalent to the number of bushels of wheat used in processing the food products for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§ 777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation. [Emphasis supplied.]

STATEMENT

Beginning with the Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U.S.C. 1281 *et seq.*, Congress has attempted to stabilize the price of various agricultural commodities, including wheat, and to prevent overproduction. In the Agricultural Act of 1964, 78 Stat. 173, which related to the crop years 1964 and 1965, Congress enacted a new program to achieve these objectives, involving the use of "wheat marketing certificates."

Prior to the 1964 Act wheat farmers complying with the acreage allotment program were guaranteed $2.00 per bushel of wheat by (1) a price support loan averaging $1.82 per bushel and (2) a Commodity Credit Corporation (hereinafter "CCC") subsidy of 18¢ per bushel (R. 74). For the 1964 crop year the national average loan rate was reduced from $1.82 per bushel to $1.30 per bushel (R. 73). In order to maintain a fair income level for growers, the 1964 Act provided for the issuance of "wheat marketing certificates" to farmers who complied with the requirements of the program. 7 U.S.C. 1379c(b).[2] Farmers receiving such certificates could (1) sell them to processors who were required to purchase certificates equivalent to

the amount of wheat contained in the food products they processed (7 U.S.C. 1379d(b)), or (2) present them for redemption by the CCC, in either case at a price equal to the face value of the certificates as determined by the Secretary. 7 U.S.C. 1379c (a), (c).

The Act required the Secretary to determine a "wheat marketing allocation" for each crop year, *i.e.*, to determine (1) the amount of wheat which he estimated would be used for food products for consumption in the United States, and (2) a portion of the amount of wheat which he estimated would be exported. 7 U.S.C. 1379b.[3] Marketing certificates equivalent to the number of bushels in the allocation were to be distributed among complying growers: domestic certificates, for the portion of the allocation representing the estimated amount of wheat to be used for food products for consumption in the United States; and export certificates, for the portion of the allocation representing wheat used for exports. 7 U.S.C. 1379c(a).

The Act provided a complex formula under which marketing certificates equivalent to the wheat marketing allocation would be distributed among the total number of complying growers. 7 U.S.C. 1379b, 1379c(a). The formula was designed to take into account the fact that some wheat growers would elect

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[2] Wheat marketing certificates were issued to growers who agreed to keep within specified acreage allotments and who agreed, in addition, to devote a portion of their normal wheat allotment to specified soil conservation purposes. 7 U.S.C. 1339(a)(1), 1379c(b).

[3] The allocation included that portion of the estimated exports on which the Secretary determined that marketing certificates should be issued in order to achieve certain specified objectives as to growers' income. 7 U.S.C. 1379b.

not to comply with the program, and to provide a mechanism by which the certificates which would have gone to the non-complying farmers would be distributed to the growers who elected to comply.[4]

The Secretary estimated that during the 1964 crop year 500 million bushels of wheat would be used for food for consumption in the United States, and that export certificates should be issued on an additional 500 million bushels of estimated exports (R. 37–38). Pursuant to the statutory formula (7 U.S.C. 1379c (c)), the Secretary set the face value of domestic certificates at 70¢ per bushel, and of export certificates at 25¢ per bushel (R. 38). Thus, complying farmers in 1964 were entitled to receive a total of $2.00 per bushel through price support loans and through the issuance of domestic certificates on that portion of their production estimated to be used for food for consumption in the United States; a total of $1.55 a bushel through price support loans and the issuance of export certificates on the portion of their production estimated to be exported; and $1.30 a bushel on the remainder (R. 74).

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[4] In the Food and Agriculture Act of 1962, 76 Stat. 605, Congress had enacted a program involving the use of wheat marketing certificates in which participation by all wheat growers was compulsory. The 1962 Act was intended to become effective during the 1964 crop year, but did not receive the approval of two-thirds of the wheat growers and therefore never went into effect (R. 72).

As noted above, the 1964 Act required wheat processors to purchase domestic marketing certificates equivalent to the total number of bushels of wheat "contained in" food products processed by them. 7 U.S.C. 1379d(b).[5] In order to facilitate the movement of certificates from farmers to millers, the CCC acted as a conduit or intermediary, issuing domestic marketing certificates to complying producers and selling such certificates to processors. In practice, certificates were seldom used; the farmer received from the CCC 70¢ per bushel of wheat in his domestic allocation, and each processor was required to pay 70¢ per bushel to the CCC for all the wheat milled into food products (R. 74–75).

As required by the statute (7 U.S.C. 1379j, 1379f), the Secretary, after consultations with representatives of the processing industry, issued regulations implementing the statute. The regulations required processors to purchase domestic certificates equivalent to the "number of bushels of wheat used in processing the food products" (7 C.F.R. 777.11(a)). The regulations also provided that the millers could determine their certificate liability either (1) on the basis of the actual weight of the wheat (7 C.F.R. 777.13) less deductions for dockage (*i.e.*, impurities) and for dehydration during storage up to 0.6% (7 C.F.R. 777,

[5] Exporters were also required to acquire export marketing certificates equivalent to the total number of bushels of wheat exported by them. 7 U.S.C. 1379d(b).

Appendix II), or (2) by the application of conversion factors so as to derive an approximation of the number of bushels of wheat from the weight of the finished food product (7 C.F.R. 777.14).[6]

Petitioners brought these actions for a judgment declaring unlawful the Secretary's regulation requiring processors to purchase certificates equivalent to the "number of bushels of wheat used in processing the food products" (7 C.F.R. 777.11(a)). Their principal contention is that the regulation conflicts with the language of the Act (7 U.S.C. 1379d(b)), requiring processors to purchase "certificates equivalent to the number of bushels of wheat contained in

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[6] In the Food and Agriculture Act of 1965, 79 Stat. 1187, Congress continued the wheat marketing certificate program for the crop years 1966 through 1969. The provision of 7 U.S.C. 1379d(b) requiring wheat processors to purchase domestic certificates equivalent to the total number of bushels of wheat "contained in" food products processed by them was not affected by the 1965 amendments. The Secretary's regulations affecting processors, referred to herein, were not changed significantly. However, under the 1965 Act, for the first time, the face value of domestic certificates issued to farmers differed from the price at which such certificates were sold to processors. The face value of domestic certificates issued to farmers was increased substantially, but the 1965 Act required that the price at which the certificates were sold to processors be maintained at approximately the same level as under the 1964 Act. For the 1966 crop year, the face value of domestic certificates for farmers was $1.32 per bushel, and the cost of the certificates to processors was 75¢ per bushel. The face value for domestic certificates had previously been increased to 75¢ for the 1965 crop year. See 7 U.S.C. (1965 Supp.) 1379e, 1445a; 7 C.F.R. 777.4(a).

such product." Petitioners urge that, while the Secretary's regulation requires the processors to purchase certificates for all of the wheat purchased from wheat growers for use in food products, the statute requires only that the processors buy as many certificates as there are bushels of wheat physically incorporated in the flour or other food products. Petitioners' alternative contention is that the Secretary's regulations (7 C.F.R. 777, Appendix II) are "arbitrary, discriminatory and without rational basis" since they allow only limited deductions for impurities, defective kernels, and dehydration.

A wheat kernel consists, in general, of three elements—endosperm (83%), which is the source of white flour; bran (14½%), which is included in whole wheat flour or used for animal food; and germ (2½%), which is used for animal food (Exhibit 5 to Godfrey affidavit, R. 43). A bushel of wheat as delivered to the processor contains impurities and defective kernels which must be screened out in the milling process, and moisture which is lost in storage and in processing (R. 41–43). Petitioners' contention is that Section 1379d(b) requires processors to pay 70¢ per bushel only for that portion of the wheat (principally the endosperm) that is retrieved for human consumption and not for the portions (principally "millfeeds" (R. 23–24)) that are removed in the milling process. Since in the production of flour from wheat some 27 or 28 percent of the wheat is

removed (R. 39, 75),[7] under petitioners' theory the processors' certificate price would be approximately 51¢ for each bushel of wheat utilized, instead of the 70¢ per bushel of wheat received by the farmer (R. 75).[8] When multiplied by the appropriate number of bushels, the difference between those two amounts is approximately $95 million for each of the crop years 1964 and 1965 (R. 39).

On cross-motions for summary judgment the district court entered judgment for the respondents. The court of appeals (Bazelon, C. J., and Danaher and McGowan, JJ.) unanimously affirmed. Noting that petitioners' contentions as to the "plain meaning" of the Act reflected "a highly optimistic view of the human capacity to communicate precise meaning by the written word," the court found that the statutory language here was not so clear as to preclude resort to the legislative history (Pet. App. B 4–5). That history, it found, leads "ineluctably * * * to a firm impression that all persons interested in the legislation, including the millers themselves" understood that under the legislation "one buying a bushel of wheat from a farmer to make flour would have to pay 70 cents for a certificate," and thus that the Secretary's reading of the Act was correct (Pet. App. B 7).

Separate petitions to review the decision of the court of appeals were filed by The Morrison Milling Company (No. 692), and by General Mills, Inc. and

[7] The reference in the court of appeals opinion (Pet. App. B–4) to a figure of 18% is apparently a typographical error.

[8] 72%×70¢=50.4¢.

others (No. 693). Because the two petitions raise identical legal issues we submit this joint reply.

ARGUMENT

Relying upon what they deem to be the plain meaning of 7 U.S.C. 1379d(b), petitioners challenge, as inconsistent with the statute, the Secretary of Agriculture's regulation requiring the purchase by wheat processors of domestic marketing certificates equivalent to the wheat used by them in producing food products. The Secretary's regulation, however, is a reasonable interpretation of the statutory language and effectuates the congressional purpose. Accordingly, both courts below were clearly correct in sustaining the regulation. While the amount sought by petitioners for the crop years 1964 and 1965 is large,[9] the issue raised by the petitions has no prospective significance, for petitioners' contentions were considered and expressly rejected by Congress when, in the Food and Agriculture Act of 1965, 79 Stat. 1187, it enacted a wheat certificate program for the crop years 1966 through 1969 (see n. 10, *infra*, p. 12). Accordingly, since there is no conflict of decisions, further review by this Court is not warranted.

1. The chief issue presented by these petitions—whether the Secretary improperly required processors to purchase certificates for each bushel of wheat used

[9] The cost of the marketing certificates which petitioners purchased in 1964 and 1965 was a cost of doing business, and presumably was passed on to their customers. There is, however, no reason to suppose that petitioners would pass on to their customers that portion of the cost which they seek to recapture in this litigation (estimated to be approximately $95 million a year, or a total of approximately $190 million (R. 39)).

in the process of making flour or other food products, instead of for each bushel of the refined product (*supra*, p. 9)—was specifically brought to the attention of Congress when, in the Food and Agriculture Act of 1965, 79 Stat. 1187, it enacted a wheat certificate program for the crop years 1966 through 1969. At that time, petitioners' contentions were explicitly rejected,[10] thus disposing of comparable claims under the 1965 Act, and depriving the issue of any prospective significance.

2. Petitioners rely upon the "plain meaning" of the statute without reference to the legislative history, design or purpose. That reliance is misplaced, not only because a statute should be interpreted to carry out its purpose even if the literal words (read in

[10] H. Rep. No. 631, 89th Cong., 1st Sess., p. 44:

"The committee is aware of the lawsuit which has been brought by processors against the Secretary alleging that the regulations of the Department are inconsistent with the statute. Because of the critical importance of this matter to the whole statutory framework of the certificate program, the committee gave consideration to amending the language of the statute to make it doubly clear that the Congress intends that the processor be required to purchase certificates equivalent to the total number of bushels of wheat used in processing flour and other food products without deduction for the byproducts and wastes resulting in processing of flour or other food product, and not merely on the net weight of the flour or other food product, as contended by the processors. However, the committee believes that no amendment is needed. *The present language of the statute in the opinion of the committee clearly expresses the congressional intention that the processor be required to purchase certificates equivalent to the total number of bushels of wheat used in processing flour and other food products.* * * *" (Emphasis added.)

isolation) convey a contrary meaning,"[11] but also because the meaning of the statute here is far from "plain" and does not lead unambiguously to petitioners' conclusion.

Wheat, as such, is not "contained in" a food product. Wheat is a raw material which, by processing, is converted into flour or other food products (see Exhibit 5 to Godfrey Affidavit, R. 43). Thus, "wheat"—as defined in the Official Grain Standards (R. 41) and as understood in the grain market—no longer exists when the processing operation is completed; a wholly different commodity—flour—has been produced. Nor can it be said that the "ordinary, everyday" sense of the language supports only petitioners' interpretation. For, as the court of appeals recognized (Pet. App. B 5), the terms "contained in" and "used in" are frequently interchangeable in everyday speech. While Section 1379d(b) requires processors of food products to "acquire domestic marketing certificates equivalent to the number of bushels of wheat contained in such product * * *," Section 1379c(a) directs the Secretary to arrange "for the issuance of domestic marketing certificates for the portion of the wheat marketing allocation representing wheat *used for* food products for consumption in the

[11] *E.g.*, *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 399–400; *United States* v. *Shirey*, 359 U.S. 255, 260–261; *United States* v. *American Trucking Assns.*, 310 U.S. 534, 542–543.

Even if the statute were a tax measure, as petitioners contend, the same rule would apply. See *e.g.*, *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479; *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394; *White* v. *United States*, 305 U.S. 281, 292; *United States* v. *Whitridge*, 197 U.S. 135, 143.

United States * * *'" (emphasis added). It seems evident that Congress regarded the two terms as synonymous.

Petitioners' contentions ignore the nature of the program Congress devised. From the Act as a whole it is clear that Congress anticipated that the total number of certificates issued to farmers would equal the total number of certificates needed by processors—at least if the Secretary's forecast of "the amount of wheat [that] will be used * * * for food products for consumption in the United States" (7 U.S.C. 1379b) proved accurate. The Act does not involve two distinct types of domestic certificates—one for farmers and one for processors—but only a "marketing certificate" that was to be issued to farmers and purchased by processors. See 7 U.S.C. 1379c(a) and (c), 1379d(b). It was thus hoped that the processors would bear the cost of this aspect of the wheat subsidy program. Under petitioners' interpretation of the Act, processors would have needed significantly fewer certificates than were to be issued under the Act to farmers. That interpretation, therefore, would frustrate the congressional purpose to balance the payments to the growers by receipts from the processors. That purpose is disclosed by 7 U.S.C. 1379e, which authorizes the Secretary to charge processors, "in addition to the face value" of the certificates, enough "to cover estimated administrative costs * * * and estimated in-

terest incurred on funds of the Corporation [CCC] invested in certificates purchased by it."[12]

Petitioners urge that their construction of Section 1379d(b) is confirmed by Section 1379f,[13] which they interpret as requiring the Secretary to establish conversion factors for use in determining the amount of wheat physically incorporated in flour from the amount of wheat used in manufacturing flour (Morrison Milling Pet. 16–18; General Mills Pet. 22). Since little besides wheat goes into the making of flour, petitioners are arguing, in effect, that Congress intended the conversion factors to be used to establish

[12] The claim is made (Morrison Milling Pet. 11–12) that for the 1964 crop year the CCC realized a net profit of $75.2 million from the domestic marketing certificate program. In point of fact, the $75.2 million figure was merely an estimate of the position of the CCC for the crop year 1964 with respect to both the domestic and the export certificate programs. Although the figures have not been published, we are informed by the Department of Agriculture that the excess of domestic certificates purchased by processors over domestic certificates received by growers was approximately $24.2 million in 1964 and $10.375 million in 1965. The discrepancies reflect the fact of inaccurate estimates by the Secretary, but the goal of the statute was still equivalence. Moreover, if petitioners prevail in this suit and realize $190 million for the years 1964 and 1965, the government would obviously incur a huge deficit for those years. In the Food and Agriculture Act of 1965 Congress provided that for the crop years 1966 through 1969 the cost of any excess of domestic certificates issued to producers over domestic certificates acquired by processors should be borne by the CCC. 7 U.S.C. (1965 Supp.) 1379b.

[13] 7 U.S.C. 1379f provides:

"The Secretary shall establish conversion factors which shall be used to determine the amount of wheat contained in any food product. The conversion factor for any such food product shall be determined upon the basis of the weight of wheat used in the manufacture of such product."

the weight of the flour. This argument ignores, as the court of appeals noted (Pet. App. B 6, fn 1), the historical background to Section 1379f. For many years preceding the enactment of the statute the Department of Agriculture had established and employed conversion factors for the benefit of processors who did not have adequate facilities for weighing wheat. On the other hand, processors necessarily have facilities for weighing flour since price depends on weight as well as quality. The established conversion factors, therefore, provided a means of determining the weight of the wheat. These factors were changed from time to time after consultations with milling industry representatives and, after the enactment of the 1964 Act, regulations provided for similar conversion factors for flour under the domestic marketing certificate program (R. 68–69).

In light of the historic background of Section 1379f, and the statute's interchangeable use of the terms "contained in" and "used in", the correct meaning of Section 1379f emerges. The conversion factor to be established by the Secretary "shall be used to determine the amount of wheat contained in any food product." The unknown, therefore, is wheat, not flour or other food products. The statute then provides that, for use in finding the unknown quantity in any particular case, the Secretary shall establish "a conversion factor" for each type of product and that factor is to be derived "upon the basis of the weight of the wheat used in the manufacture of such product." In other words, the conversion factor, to be applied to the flour,

is designed to establish the amount of wheat used in its manufacture through the application of a conversion factor based upon the normal quantitative relationship between wheat and flour.

From the foregoing it seems apparent that the Secretary's regulation (7 C.F.R. 777.11(a)) is consistent with the statutory language and serves the legislative purpose.[14] In addition, the correctness of the Secretary's interpretation is confirmed by the congressional understanding as to the cost of the certificate program to the processors. It was generally understood during the congressional debates on the 1964 Act that the millers would pay a total of approximately $2 per bushel under the new program—reflecting the average CCC loan rate of $1.30 per bushel plus a 70¢ certificate for each bushel milled. This could be true only if the millers were required to pay for their certificates on the basis of all the wheat used in processing food products. While critics of the program suggested that the actual cost would be more than $2.00, nowhere in the legislative history did anyone suggest that the millers' cost per bushel of wheat would be less than

[14] A regulation duly issued by the agency charged with administering the statutory scheme is, of course, valid unless "unreasonable" and "plainly and palpably inconsistent" with the underlying statute. *Boske* v. *Comingore*, 177 U.S. 459, 470; *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501; *Udall* v. *Tallman*, 380 U.S. 1, 16. And where, as here, the administrative practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion" while the statute is "untried and new," particularly great weight should be accorded the administrative construction. *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315.

$2.00. See, for example, the exchange between Senator McGovern, the floor manager of the wheat bill, and Senator Morton, 110 Cong. Rec. 4169, quoted by the court of appeals (Pet. App. B 6–7, fn. 2).[15] Similarly, in the House of Representatives, Congressman Purcell, the floor manager of the wheat bill, stated (110 Cong. Rec. 6383):

> Domestic millers will know in advance the value of the marketing certificates they must purchase. * * * They know that with every 1,000 bushels of wheat purchased and utilized for domestic food products they must purchase the equivalent number of wheat marketing certificates at the price set for the entire marketing year by the Secretary of Agriculture.

Moreover, the present position of petitioners to the effect that the price of a bushel of wheat to the millers should be roughly $1.80 (based on the $1.30 loan price plus certificate cost of 50¢) is in contrast to the position of the millers at the time the 1964 Act was under consideration. At that time, the millers recognized that they would be required to pay for their certificates on the basis of all the wheat used in processing a food product, and contended that the cost of wheat to them would rise above $2. See 110 Cong. Rec. 7178–

[15] See, also, S. Rep. No. 874, 88th Cong., 2d Sess., pp. 17–18 (1964); 110 Cong. Rec. 4105, 4169–4170, 4634, 4637, 4639, 7175, 7178, 7309, 7312, 7325–7326, 7335.

In the course of the debate, Senator McGovern read to the Senate a statement from the Secretary to the effect that if the bill were enacted, the cost of wheat to millers, including the value of the certificates, should be about the same as in recent years inasmuch as under the proposed legislation the support price would be around $2 per bushel (110 Cong. Rec. 4370).

7182; Hearings before the Senate Committee on Agriculture and Forestry, 88th Cong., 2d Sess., Vol. 2, pp. 86, 129–130, 144–145 (1964).

3. In addition to their principal contention, petitioners argue that the regulations are "arbitrary, discriminatory and without rational basis" since they require processors to pay for foreign substances and unsuitable wheat, wastage and shrinkage (Morrison Milling Pet. 26–27; General Mills Pet. 11, 21).[16]

In point of fact, a substantial portion of the foreign matter is accounted for by dockage, which is not considered to be wheat and is eliminated from the weight upon which certificate payments are made (R. 41–42). In addition, the processor is not required to include in the weight of the bushel of wheat shrinkage (from dehydration during storage) up to 0.6% (R. 43). Even though not all foreign matter is included in dockage, and assuming shrinkage can exceed 0.6%, the fact is that these additional losses are inherent in the milling process (R. 43). Moreover, damaged kernels and foreign materials, to the extent that they are not accounted for in dockage, are factors determining quality, upon which the market price of wheat is based (R. 42–43). Petitioners' fundamental complaint, therefore, is that the Secretary has based their certificate liability on quantity, and has given no consideration to quality differentials. However, there is nothing in the statute remotely suggesting that payments were to be based upon quality; indeed, the legislative history is

[16] Petitioners admit, as they must (Morrison Milling Pet. 26, fn. 25), that the principal portion of their claim is represented by "millfeeds", *i.e.*, the portion of the wheat which is removed in processing operations.

to the contrary. Hearings before the Senate Committee on Agriculture and Forestry, 88th Cong., 2d Sess., Vol. 2, pp. 144–145 (1964). The only statutory requirement was that the Secretary collect a fixed price for each bushel of wheat.[17]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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DECEMBER 1966.

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[17] Petitioners also overlook the fact that Congress prescribed the use of a conversion factor, and a simple conversion factor could not be devised if quality were taken into account. The implication in petitioners' argument is that the Secretary was under some legal duty to establish a complex system which would give effect to the infinite variations present in the condition of wheat and its usages. However, there is nothing in the statute requiring the Secretary to formulate such a system.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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No. 692

In the

Supreme Court of the United States

OCTOBER TERM, 1966

THE MORRISON MILLING COMPANY,
Petitioner,

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER THE MORRISON MILLING COMPANY

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REPLY BRIEF OF PETITIONER THE MORRISON MILLING COMPANY

Petitioner The Morrison Milling Company, as is to be expected, takes exception to a number of statements made in the Brief for the Respondents in Opposition ("Brief in Opposition"). The exception to one such statement is of such consequence that it requires this Reply Brief under Rule 24(4).

The Brief in Opposition, pp. 11-12, asserts that the 89th Congress, in enacting the Food and Agriculture Act of 1965, 79 Stat. 1202—which extended the wheat marketing certificate program for the wheat crop marketing years 1966 through 1969, with certain modifications, but in precisely the same

operative language as that certificate program existed for the crop years 1964 and 1965 under the Agricultural Act of 1964, 78 Stat. 173—"explicitly rejected" the Petitioner's contentions, "thus disposing of comparable claims under the 1965 Act, and depriving the issue of any prospective significance."[1]

This assertion is erroneous, both factually and legally.

Factually, the only thing cited in its support by the Brief in Opposition, pp. 11-12, is House Rep. No. 631, 89th Cong., 1st Sess., p. 44. Yet, examination of this House Report negates any such supposed "explicit rejection" by Congress because of these facts: House Report No. 631 *was not* approved by 11 members of the committee (in which the total voting on "major amendments" ranged from 23 to 35); that "Additional Minority Views" of four committee members noted accord with Petitioner's position by stating that:

> "The domestic certificates apply only to human food use, thus wheat used for cat, dog, and other pet foods, together with certain industrial wheat products would not be subject to the certificates" (House Rep. No. 631, pp. 111, 136);

that the bill (H.R. 9811) reported by this House Report *was not* enacted: the Senate "struck out all after the enacting clause of H.R. 9811 and substituted a Senate amendment

[1] The purpose of this assertion was to attempt to refute one of the reasons advanced by Petitioner for the granting of the writ, to wit: "Involved are extraordinarily large amounts of money—estimated by the Government itself to total some $95 million dollars for each year in controversy (R. 39). This question is, moreover, of continuing vital concern to wheat processors—and the sums of money in dispute will continue to pyramid—under the subsequent wheat subsidy program [The Food and Agriculture Act of 1965, 79 Stat. 1202] which extended the marketing certificate liability of processors, in precisely the same operative statutory language here at issue, for the wheat crop years of 1966 through 1969." (Petition for Certiorari, p. 14).

which, while dealing with the same subject matter, differed from it in several major respects"; and, after points of difference between the House bill and the Senate amendment had been resolved by conference committee, Conference Report No. 1123, upon which the bill was then passed by both houses, recommended that "the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows * * * ". 1965 U.S. Code & Admin. News, pp. 3957, 4020; Conference Rept. No. 1123, 89th Cong., 1st Sess. (Oct. 6, 1965).

Moreover, as a matter of law, such isolated statements in committee reports made well after the enactment of legislation cannot determine the meaning of that legislation. *Fogarty v. United States*, 340 U.S. 8, 13-14 (1950); *United States v. United Mine Workers*, 330 U.S. 258, 282 (1946); *Penn Mutual Life Ins. Co. v. Lederer*, 252 U.S. 523, 537-38 (1920). Indeed, to permit pending cases thus to be retroactively disposed of by any such statement placed in subsequent "legislative history"—which could be done, perhaps, even at the instance of the administrative body whose practices are being questioned in such cases—would be a dangerous precedent, which in itself demonstrates further need for the Court to grant the petition for a writ of certiorari sought in the present appeal.

It is, in fact, anomalous that the Brief in Opposition even attempts to rely upon the Food and Agriculture Act

of 1965[2]—for the regulations issued under that Act by the Secretary for the 1966 wheat crop year graphically demonstrate the error of the Respondents' primary argument: the supposed "equivalence" between the face amount of the certificate payments made to farmers (70¢ per bushel in 1964; 75¢ per bushel in 1965) and the certificate liability of the wheat processors (also 70¢ per bushel in 1964 and 75¢ per bushel in 1965) under the 1964 Act. Operating under precisely the same operative statutory language which requires the Secretary to fix the face value of marketing certificates,[3] *for the*

[2] It is also anomalous, Petitioner submits, for the Respondents to have contended before Congress that the wheat marketing certificate program would not result in any increase in the price of flour (Brief in Opposition, pp. 17-18; Petition for Certiorari, pp. 22-24)—and now to make the claim, *totally outside of the record*, that wheat processors should be denied recovery because a supposed increase in the price of flour "presumably" passed on to their customers the cost of marketing certificates. Brief in Opposition, p. 11 at fn. 9.

Moreover, Respondents' further assertion that there "is no reason to suppose that petitioners would pass on to their customers that portion of the cost which they seek to recapture in this litigation" (Brief in Opposition, p. 11 at fn. 9) is totally without foundation in the record and is, in fact, erroneous: many of the wheat processors would, by contract, be required to pass on to their customers substantial portions of any recovery in this case. And, in no event would any supposed "passing on" afford any defense to the actions of the Respondents in illegally increasing the marketing certificate liability of the wheat processors to the extent of some $95 million dollars per year. Cf. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-35 (1918); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 335 F. 2d 203 (7th Cir. 1964).

[3] Both the Agricultural Act of 1964 (applicable to 1964 and 1965 wheat crop years) and the Food and Agriculture Act of 1965 (applicable to the 1966-69 crop years) provide in this regard in 7 U.S.C. § 1379c(c): "The Secretary shall determine and proclaim for each marketing year the face value per bushel of wheat marketing certificates. The face value per bushel of domestic certificates shall be the amount by which the level of price support for wheat accompanied by domestic certificates exceeds the level of price support for wheat not accompanied by certificates (noncertificate wheat)."

1966 crop year the Secretary fixed the face value of certificate payments made to farmers at $1.63 per bushel and the face value of the certificate liability of wheat processors at 75¢ per bushel (Brief in Opposition, p. 8 at fn. 6). Petitioner invites, without further comment, the Court's consideration of this fact in view of the Respondents' assertions that the purpose of the wheat marketing certificate program would be "thwarted" if their theory of "equivalence" between certificate payments and certificate liability were rejected, to-wit:

> "Petitioners' contentions ignore the nature of the program Congress devised. From the Act as a whole *it is clear that Congress anticipated that the total number of certificates issued to farmers would equal the total number of certificates needed by processors*—at least if the Secretary's forecast of 'the total amount of wheat [that] will be used * * * for food products for consumption in the United States' (7 U.S.C. 1379b) proved accurate. *The Act does not involve two distinct types of domestic certificates—one for farmers and one for processors—but only a 'marketing certificate' that was to be issued to farmers and purchased by processors.* See 7 U.S.C. 1379c(a) and (c), 1379d(b). It was thus hoped that the processors would bear the cost of this aspect of the wheat subsidy program. Under petitioners' interpretation of the Act, processors would have needed significantly fewer certificates than were to be issued under the Act to farmers. *That interpretation, therefore, would frustrate the congressional purpose to balance the payments to the growers by receipts from the processors* * * *" (Brief in Opposition, p. 14) (Emphasis added).

For the foregoing reasons and for the reasons stated in the Petition for a Writ of Certiorari, this petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Neary, attorney for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of the foregoing Reply Brief of Petitioner The Morrison Milling Company were on this 5th day of January, 1967, served upon Respondents Orville L. Freeman and Commodity Credit Corporation by mailing copies of such Reply Brief, properly addressed, with air mail postage prepaid, to:

(i) the Honorable Thurgood Marshall, Solicitor General of the United States, U. S. Department of Justice, Washington, D. C. 20530.

(ii) Barefoot Sanders, Assistant Attorney General, David L. Rose and Leonard Schaitman, Attorneys, U. S. Department of Justice, Washington, D. C. 20530.

William D. Neary
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